TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 481

ROCKWELL KENT AND WALTER BRIEHL,
PETITIONERS,

vs.

JOHN FOSTER DULLES, SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 18, 1957
CERTIORARI GRANTED NOVEMBER 25, 1957

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,297

ROCKWELL KENT, *Appellant*

v.

JOHN FOSTER DULLES, Secretary of State, *Appellee*

Appeal from the United States District Court for the District of Columbia

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JOINT APPENDIX

Filed Dec. 14, 1955

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5441-55

ROCKWELL KENT, Ausable Forks, New York, *Plaintiff*

v.

JOHN FOSTER DULLES, Secretary of State, Department of State, Washington, D. C., *Defendant*

Complaint for Declaratory Judgment and Injunction

The plaintiff, Rockwell Kent, by his attorneys, complaining of the defendant, John Foster Dulles, Secretary of State, alleges as follows:

1. The Court has jurisdiction of this action under D. C. Code Sections 11-305 and 11-306; under Section 10 of the Administrative Procedure Act, Title 5 U. S. Code section 1009; and under Title 28 U. S. Code, section 2201.

2. The defendant, John Foster Dulles, is Secretary of State of the United States, and is charged by law with the duty of issuing passports in the United States.

3. The plaintiff is a citizen of the United States, residing in Ausable Forks, New York. He is an internationally known artist.

4. On August 2, 1955, plaintiff applied for a passport to travel to Europe to paint pictures.

5. On November 8, 1955, plaintiff appeared at the Passport Office for a hearing upon his application for a passport. He demanded that he receive a passport or that he be confronted with the evidence upon which the defendant would base his denial of a passport. The defendant refused to comply with this request, maintaining that the sole purpose of the hearing was to give officials of the State Department an opportunity to

question the plaintiff concerning his lawful political beliefs and associations. The plaintiff, nevertheless, insisted upon his right to a passport or to be confronted with the evidence against him and refused to submit himself to such an inquisition.

6. Thereafter on November 25, 1955, the Director of the Passport Office informed the plaintiff that she would take no action on his application for renewal because of the plaintiff's refusal to submit himself to an inquisition into his political beliefs and associations in the absence of being confronted with the evidence, if any, upon which the State Department relied.

7. The action of the defendant in this case is unlawful in that:

a. Plaintiff as an American citizen has a right under the First, Fifth, Ninth and Tenth Amendments to travel outside of the United States.

b. The statutes authorizing the Secretary of State to issue passports do not authorize him to impose political conditions upon the issuance of passports. The regulations issued by the Secretary of State are not authorized by statute and are on their face arbitrary and illegal in that they impose political conditions upon travel in violation of applicable statutes and the First and Fifth Amendments of the Constitution.

c. Due process of law requires that before an individual be denied the right of travel he must be accorded a hearing at which he will have the opportunity to be confronted with the evidence against him.

d. There is no authority in the statute authorizing the issuance of passports for the imposition of a test oath as a condition precedent to consideration of an application for a passport; and the imposition of such a condition is in violation of the First and Fifth Amendments.

8. The plaintiff has exhausted his administrative remedies.

9. The actions of the defendant in denying the plaintiff a passport have interfered with plaintiff's rights of travel, free speech, association and livelihood and are causing the plaintiff irreparable injury for which he has no adequate remedy at law.

WHEREFORE, plaintiff prays for a judgment

a. Decreeing that the plaintiff, as an American citizen, is entitled to a passport under the statutes of the United States, including the Passport Act of 1926.

b. Decreeing that the passport regulations of the Secretary of State are invalid and illegal and are in violation of the statutes of the United States, including the Passport Act of 1926, the Constitution of the United States and the Universal Declaration of Human Rights of the United Nations.

c. Decreeing that the defendant's refusal to issue a passport to plaintiff is in violation of the plaintiff's rights under the Passport Act of 1926, the Constitution of the United States and the Declaration of Human Rights of the United Nations.

d. Enjoining the defendant from continuing to deny a passport to the plaintiff.

e. Directing the defendant to issue a passport to plaintiff.

f. And for such other and further relief as may be just and proper.

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58 Filed Feb. 13, 1956

Answer

Now comes the defendant, John Foster Dulles, Secretary of State of the United States, and in answer to plaintiff's complaint for declaratory judgment and injunction says the following:

FIRST DEFENSE

1. Defendant asserts that inasmuch as the allegations contained in paragraph 1 of the complaint state conclusions of law, he is not required to plead thereto, but were he required to reply he would deny the conclusions alleged therein.

2. Defendant denies the allegations contained in paragraph 2 of the complaint except that defendant admits that he is Secretary of State of the United States and that as Secretary he alone is authorized to grant or issue, or refuse to grant or issue, passports under such rules as the President designates.

3. Defendant admits that plaintiff is a citizen of the United States, residing in Ausable Forks, New York. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 3 of the complaint.

4. Answering the allegations contained in paragraph 4 of the complaint, defendant admits that on August 2, 1955, plaintiff applied for a passport for travel to various
59 western European nations and Czechoslovakia for the stated purpose of pursuing his profession and for pleasure.

5. Defendant denies the allegations contained in paragraph 5 of the complaint, except that defendant admits that on November 8, 1955, plaintiff and his attorney attended an informal hearing in the Passport Office on his application for a passport.

6. Defendant denies the allegations contained in paragraph 6 of the complaint except that defendant admits that by letter dated November 25, 1955, plaintiff was advised that in view of his refusal to furnish a sworn statement with respect to his present or past membership in the Communist Party the Department of State would give further consideration to his passport application at such

times as he was willing to comply with the Passport Regulations.

7. Defendant asserts that inasmuch as the allegations contained in paragraph 7 of the complaint state conclusions of law, he is not required to plead thereto, but were he required to reply he would deny the allegations contained therein.

8. Defendant denies the allegations contained in paragraph 8 of the complaint.

9. Defendant asserts that inasmuch as the allegations contained in paragraph 9 of the complaint state conclusions of law, he is not required to plead thereto, but were he required to reply he would deny the allegations contained therein.

SECOND DEFENSE

The complaint fails to state a claim upon which relief may be granted.

THIRD DEFENSE

The court lacks jurisdiction over the subject matter of the complaint.

FOURTH DEFENSE

Plaintiff has failed to comply with the Passport Regulations and consequently is ineligible for a passport.

60 FIFTH DEFENSE

Plaintiff has failed to exhaust his administrative remedies.

WHEREFORE, defendant, having fully answered the allegations contained in the numbered paragraphs of the complaint, prays that the complaint herein be dismissed, with costs taxed against the plaintiff.

7 Filed Feb. 7, 1956

Motion for Preliminary Injunction

Plaintiff, by his attorneys, moves the Court for a preliminary injunction enjoining, pending the disposition of this action, the defendant, his officers, agents, servants, employees and attorneys, and all persons in active concert or participation with him from denying a passport to plaintiff, and directing the defendant to issue a passport to the plaintiff for use during the pendency of this action.

The grounds of this motion are that unless so enjoined the defendant's action will cause the plaintiff irreparable injury before this cause can be disposed of.

In support of this motion plaintiff refers to the pleadings herein and to the affidavits filed by the plaintiff.

---

6 Filed Feb. 7, 1956

Plaintiff's Motion for Summary Judgment

Now comes the plaintiff by his attorneys and, pursuant to rule 56 of the Federal Rules of Civil Procedure moves the Court to enter summary judgment for the plaintiff on the ground that there is no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter of law. In support of this motion plaintiff refers to the entire record herein, including the pleadings and the affidavit of the plaintiff.

---

8 Filed Feb. 7, 1956

Affidavit of Rockwell Kent

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ROCKWELL KENT, being duly sworn, deposes and says:

1. I am the plaintiff in the above-entitled action, which I instituted for the purpose of compelling the defendant

to issue me a passport. I make this affidavit in support of my motion for summary judgment in said action.

2. I have read the complaint filed in this action and know the contents thereof. All of the facts alleged in the complaint are true, and I incorporate them in this affidavit.

3. I am an artist. My work which began receiving important recognition nearly fifty years ago, has included activities as painter, illustrator, wood engraver, author, lithographer, and lecturer. I am represented in many of the leading museums and private collections in this country and my work has received many awards in the Americas and in Europe. I have served on many exhibition juries, was for a number of years a member of the juries of the Guggenheim Foundation and was a member of the Guilds' Committee for Federal Writers' Publications, Inc. In 1954 one of my lithographs, "Europe", was in the graphic arts exhibition of the American Office of Information, in Paris. Among the books which I have illustrated are "Moby Dick", "Shakespeare", "Candide", "Canterbury Tales", "Leaves of Grass", "Decameron", "Paul Bunyan", and "Faust". I am the author of the following published volumes: N by E (The story of a journey by sailboat to Greenland and of shipwreck there); Rockwell Kent Iana, Few Words and Many Pictures (Essays on art and reproductions of paintings, lithographs and wood engravings); Salamina (A story of my life in Greenland); This Is My Own (A story of the purchase and development of an Adirondack farm and the distracting obligations of citizenship); and It's Me O Lord (an autobiography).

4. I have been effectively debarred by the State Department from foreign travel since the Spring or Summer of 1950. My last passport, which was issued in February 1950, was in fact, not a full passport, but was limited to a period of only a few months, expiring May 26, 1950. Under date of July 19, 1950, I wrote to the State Depart-

ment, asking for a renewal of this passport for a period of two months in order to leave for Europe on August 9, 1950 to attend the meetings of an international jury at Prague to select the winners of prizes offered in the arts of painting, literature, and the cinema; a copy of that letter is annexed hereto and incorporated herein, as Exhibit "1". Ten days later, on July 29, 1950, I wrote requesting the Department to expedite the matter, and I stated that since my previous letter (July 19, 1950) I had been invited also to attend the meeting of World Peace Congress; a copy of that letter is annexed hereto and incorporated herein as Exhibit "2".

5. I followed up this request by telephone on August 3, 1950 to the Passport Office, and a letter dated August 4, 1950, a copy of which letter is annexed hereto and incorporated herein as Exhibit "3".

6. On August 4, 1950, after my last letter had been posted, I received a letter from Mrs. R. B. Shipley, dated August 1, 1950, a copy of which is annexed hereto and incorporated herein as Exhibit "4". She stated that my passport of earlier that year had been used for travel in countries other than those for which the Department had validated it, and she requested an affidavit setting forth the details of my travel earlier in 1950, and the reason why I used the passport to go to countries for which it was not validated.

7. Immediately upon receiving the last mentioned letter I wrote Mrs. Shipley the second letter dated August 4 and annexed hereto as Exhibit "5" which fully answered her questions. I annexed an affidavit incorporating the contents of the letter.

8. On August 25, 1950, I received a letter dated August 11, 1950 from Mr. Willis H. Young, Acting Chief, Passport Division, in reply to my letter of August 4, 1950. Without commenting upon or relying to the full explana-

tion contained in my letter of August 4, 1950, Mr. Young merely noted that I was asserted to have used my passport for travel to countries for which it was not valid, that a federal statute provided for withdrawal of the protection of the United States from persons who so used a passport while they continued to reside abroad and for prosecution of such persons, and concluded: "In view of the foregoing your passport cannot be further validated." This letter is annexed hereto and incorporated herein, as Exhibit "6". I let the matter rest at that point, the occasion for my European trip that summer having lapsed owing to the time consumed in my fruitless passport application effort.

11 9. A few months later, on February 27, 1951 I again wrote to Mrs. Shipley:

"I want to go somewhere to paint pictures. I have two places in mind. One is Ireland where, on the coast of Donegal, I once spent some months, and the other is Peru, where I have always wanted to paint the mountains and ruins of the Inca civilization. I want to go there to paint pictures and for nothing else. Would a passport be issued to me for that purpose?"

A copy of this letter is annexed hereto and incorporated herein as Exhibit "7".

10. Two weeks having gone by with no word from Mrs. Shipley, I wrote to her again, on March 13, 1951, stating that

"Since writing I have eliminated Peru, for I have a patron who is particularly interested in pictures of Ireland, and who has practically assured purchases of pictures, as an important consideration in the determination of my plans."

I added:

"I repeat the statement of my recent letter that my sole purpose in going to Ireland is to paint."

A copy of this letter is annexed hereto and incorporated herein as Exhibit "8".

11. Mrs. Shipley's reply of March 21, 1951 stated:

". . . the Department is not willing at this time to grant you passport facilities for travel to any countries for any purpose."

A copy of this letter is annexed hereto and incorporated herein as Exhibit "9".

12. In 1955 I again attempted to obtain a passport. Under date of May 28, 1955, I wrote to the State Department applying for a passport to attend a meeting of the World Council of Peace, in Helsinki, Finland, to which I had been invited; a copy of that letter is annexed hereto and incorporated herein as Exhibit "10". Since that meeting was scheduled for June 22, 1955, I requested the Department to take note of the need for an expeditious decision.

12 13. On June 15, 1955 I wrote to the Department again about this because it had not replied to my application. A copy of this letter is annexed hereto and incorporated herein as Exhibit "11".

14. The Helsinki meeting was held and concluded before the State Department advised me by letter of June 29, 1955 that it was obliged to disapprove my request "tentatively" under Section 51.135 of Title 22 of the Code of Federal Regulations. The Department stated that I could have an informal hearing before the Passport Office, at which I could present my case and all relevant information, but that if I desired such a hearing I would be required to submit a sworn statement as to whether I was at that time or had ever been a Communist. If I did not desire a hearing, the Department stated, it would consider any written statement under oath that I might submit, provided that I included therein a statement as to Communist Party mem-

bership. A copy of this letter is annexed hereto and incorporated herein as Exhibit "12".

15. The purpose of my trip to attend the Helsinki conference having been frustrated by the State Department's delay, I replied to the last mentioned letter, stating my protest against the Department's action in my case and its policies in similar ones; a copy of this letter is annexed hereto as Exhibit "13".

16. In the meantime, however, I had written to President Eisenhower on June 24, 1955, after I saw that the Department had no intention of deciding the matter in time for me to go to Helsinki. This letter was one of protest against the Department's treatment of me and an affirmation of my belief that my purpose in going abroad was to serve the same high purposes of peace to which he had given utterance; a copy of it is annexed hereto as Exhibit "13a".

It was referred to the Passport Office, whose Direc-
13 tor; Miss Frances G. Knight wrote me further about the matter on July 19, 1955, reiterating essentially the same positions which the Department had taken in its previous letter of June 29, 1955; a copy of Miss Knight's letter of July 19, 1955 is annexed hereto as Exhibit "14".

On August 2, 1955, I filed a new passport application stating as the purpose of my trip, "prosecution of profession and pleasure." I applied for a passport to visit England, Ireland, France, Switzerland, Denmark, Norway, Sweden, Finland, Italy and Czechoslovakia.

18. I did not receive a decision on my application of August 2, 1955 until November 25, 1955. Between the date of my application and the Department's answer, my attorney, Mr. Leonard B. Boudin, was obliged to write to the Department at least seven times and to make numerous telephone calls in an endeavor to expedite its action.

19. On September 2, 1955 Mr. Boudin wrote the Passport Office requesting a final decision in the light of five

years of correspondence, unless the Department decided that an informal hearing was a condition precedent to a decision. A copy of this letter is annexed hereto as Exhibit "15".

20. No reply having been received, Mr. Boudin again wrote the Passport Office on September 12, 1955, a copy of which letter is annexed hereto as Exhibit "16".

21. Miss Knight replied on September 14, 1955 to Mr. Boudin's letter of September 2, 1955, stating that "a report of evaluation is expected to be forthcoming in the near future"; a copy of her letter is annexed hereto as Exhibit "17".

22. On September 20 and 28, Mr. Boudin wrote Miss Knight the letters annexed hereto as Exhibits "18" and "19" requesting a passport or a hearing, and point out the necessity for an early decision.

23. Miss Knight replied by a letter dated September 29th, to Mr. Boudin's letter of September 20th, a copy of which is annexed hereto as Exhibit "20". This letter stated that the Passport Office was awaiting a report "by another office of the Department", but that "in the meantime" I could have "an informal hearing".

24. On October 26, 1955 Mr. Boudin telegraphed Mr. Scott McLeod, the Director of the Division of Consular Affairs, requesting a telephone call from the person in charge of my case; a copy of the telegram is annexed hereto as Exhibit "21". Not having received a response to the telegram Mr. Boudin followed this by a letter the same day to Mr. McLeod, requesting a final decision; a copy of that letter is annexed hereto as Exhibit "22".

25. On October 27, 1955 Mr. Boudin had a telephone call from Mr. Orson Trueworthy, Mr. McLeod's Special Assistant, as appears from Mr. Boudin's letter of the same day to Mr. McLeod, a copy of which is annexed hereto as Exhibit "23". Mr. Trueworthy and Mr. Boudin discussed the

futility of an informal hearing which would not lead to a decision because the passport applicant contested the validity of the Department's demand for an affidavit. I am advised also that in discussions between my Washington counsel, Mr. David Rein and Mr. Ashley J. Nicholas, Assistant Director of the Passport Office, there had been a similar discussion as to the futility of a hearing, since the Department would not render a final decision where an affidavit was refused it.

26. Nevertheless Mr. Rein was advised by the Passport Office on or about November 2, 1955 that an informal hearing would be held on November 8, 1955. I attended the hearing on that day with Mr. Rein; a copy of the transcript of the "hearing" is annexed hereto as Exhibit "24". It will be noted that no witnesses were produced by the Department to support any allegations against me. The Department's principal items of documentary evidence were my recent book "It's Me O Lord", and the transcript of a hearing before the Senate Permanent Sub-Committee on Investigations. I stated, under oath, that everything in the book was true and the Department did not make any assertion to the contrary. I was asked to execute an affidavit under Section 51.142 of the Regulations and declined to do so because I regarded the demand for a test oath as illegal and in violation of my principles.

27. The record of this "informal hearing" of course speaks for itself. I think it appropriate, nevertheless, to indicate the following to the Court:

(a) I expressly denied the allegation that I had said that "the American Government is not my Government" which the Department repeated in the letter of June 29, 1955 (Exhibit 12) in complete disregard of my explicit disclaimer by letters in 1950 to the New York Times and Mrs. Shipley;

(b) It was my understanding in 1950, as it is today, that while the inability to use a passport for travel to a particular country might affect one's right to American pro-

tection in that area, it did not make travel there illegal. I am advised by counsel that the State Department has made public announcements to this effect and that many persons, including at least one United States Senator, has traveled to a country specifically excluded from his passport coverage.

16 (c) The congressional committee hearing referred to—as the Court will see from an examination of it,—contains no evidence that I have done anything wrong or indeed anything relevant, in my opinion, to the right to travel, and in addition could not be competent evidence of anything in a passport hearing.

(d) I respectfully request the Court to perceive from the record—including, as it does, excerpts from an exceptionally long and complete autobiography—that I have made the facts of my beliefs and actions public and that my refusal to discuss these matters with the Passport Office was due entirely to my conviction that a man's political beliefs and activities are irrelevant to the issuance of a passport to an American citizen.

28. A week later, on November 15, 1955, Mr. Boudin wrote Miss Knight a letter, a copy of which is annexed hereto as Exhibit "25", requesting an immediate decision in my case. On November 18, he reiterated this request orally in a meeting with Mr. Nicholas and Mr. Robert Johnson, another official of the Passport Office. This appears from Mr. Boudin's letter of November 21, 1955 to Miss Knight, a copy of which is annexed hereto as Exhibit "26", in which he requested her decision upon my application. It appears too from the correspondence that Mr. Boudin discussed this matter with Mr. Cartwright of the Legal Advisor Office of the Department of State and was assured that a decision had been drafted. Miss Knight wrote Mr. Boudin on November 22, 1955 the letter annexed hereto as Exhibit "27" to the effect that she would notify us of her decision as soon as she could. Mr. Boudin again wrote Miss Knight,
17 this time on November 25, 1955, by letter annexed

hereto as Exhibit "28" requesting that the drafted letter be transmitted to him.

29. On November 28, 1955, no decision having been received from Miss Knight, Mr. Boudin wrote her again requesting such a decision; a copy of his letter is annexed hereto as Exhibit "29". Shortly thereafter, Miss Knight's letter of November 25, 1955, copy of which is annexed hereto as Exhibit "30" was received by me. This letter noted that an informal hearing had been held in which I had failed to execute a non-Communist affidavit, or to refute or explain allegations against me.

30. On November 30, 1955 Mr. Boudin wrote to Mr. John W. Sipes, counsel to the Board of Passport Appeals, indicating (a) my desire to appeal to the Board of Passport Appeals and (b) my understanding that under the Department's passport rules and the procedures an appeal would not lie because of my refusal to take the test oath imposed upon me by Miss Knight and her failure to describe her decision as "final"; a copy of the said letter is annexed hereto as Exhibit "31".

31. No answer having been received, Mr. Boudin wrote directly to the defendant herein, the letter dated December 5, 1955, annexed hereto as Exhibit "32" requesting a response to his letter. On December 7th, Mr. Boudin wrote the Chairman of the Board of Appeals the letter annexed hereto as Exhibit "33", calling attention to the Department's failure to respond to his inquiries. To this day, neither the Secretary, nor Mr. Sipes, nor the Chairman of the Board of Passport Appeals, nor anyone else in the Department, has responded to these communications.

32. I desire to travel to Europe for the purpose indicated in my last and still pending application for a passport, namely, the practice of my profession as an artist, and the pleasure of traveling. Painting is not only a means of self-expression, it is the way in which I have earned a livelihood for nearly half a century. A passport is therefore an artistic and an economic necessity.

33. Upon the foregoing, I respectfully ask that this Court enter a summary judgment in my favor for the relief prayed for in the complaint including a direction that the defendant issue me a passport of standard form and duration.

/s/ ROCKWELL KENT

Exhibit "4"

22

DEPARTMENT OF STATE
WASHINGTON, D. C.

August 1, 1950

In reply refer to:
130 - Kent, Rockwell

Mr. Rockwell Kent,
Ausable Forks, New York.

My dear Mr. Kent:

The Department has received your letter of July 21, 1950 with reference to your application for the renewal of your passport.

It appears that your passport was last validated on February 27, 1950, valid until May 26, 1950 for travel in the British Isles, France, Sweden, Norway and Denmark only. However, upon examination of the passport, it appears that during the above mentioned period the passport was used for travel in other countries. Before giving further consideration to the matter of granting you passport facilities for your proposed trip, the Department desires to be furnished with an affidavit setting forth the details of your travel on the aforementioned trip and the reason why you used the passport in violation of the restrictions contained therein.

Sincerely yours,

R. B. Shipley,
Chief, Passport Division.

Exhibit "5"

23 August 4, 1950

Your Ref:
130 - Kent, Rockwell

Mrs. Ruth Shipley
Department of State
Passport Division
Washington, D. C.

Dear Mrs. Shipley:

I had just posted a letter addressed to you when I received your letter of August 1st., post-marked Washington, August 2nd., 9:00 P.M. I hasten to reply by the same mail. I am glad to explain the circumstances of my having visited countries which I had not listed in my application for passport, and which were consequently not listed in the passport, and to detail the reasons for that trip.

I was invited by the World Peace Congress to be one of an international delegation to meet Monsieur Herriot, President of the French Chamber of Deputies, and appeal to him to place before the Chamber of Deputies for their consideration the proposal that France, in concert with other nations, act to outlaw atomic weapons and move immediately toward the reduction of all armaments. I was glad to serve in such a cause. On the very day of my arrival in Paris I did accompany the delegation to its interview with Mr. Herriot. On the following day, I believe, I was one of six speakers to address a large group of the French Deputies and appeal to them directly for action toward the reduction of armaments and the establishment of world peace.

It had been suggested that I attend the Stockholm Conference of the World Peace Congress, but that suggestion was not made a request until a week later.

While in Paris, I was asked by the Committee of the World Peace Congress if I would accompany an internation-

al delegation to Moscow, where it had been arranged they should appear before the Supreme Soviets to ask if that body would join with other nations in the outlawing of atomic weapons and in the reduction of armaments in general. They had counted upon certain other Americans becoming members of that delegation, but in that hope they were disappointed and I was asked if I would go as a substitute. Again, I was glad to go in such a cause. I was accompanied on the trip by the American news reporter, Johannes Steel; and we were joined in Moscow by Mr. O. John Rogge.

En route to Moscow, it was necessary that we stop overnight in Prague.

While in Moscow I spoke impromptu for about five minutes at a banquet of the leading Soviet intellectuals and clergy; and I also spoke at a press conference in reply to questions on the peace movement. The rest of my six days in Moscow were spent in sightseeing or, in the evenings, at places of entertainment or purely social events. It was in Moscow that I was asked to proceed with others to the Stockholm Conference of the World Peace Congress.

After leaving Moscow, I spent a few hours between trains at Leningrad, stayed overnight at Helsinki and proceeded from there to Stockholm.

24 In Stockholm I attended all the sessions of the peace Congress and spoke but once, and briefly. I spoke to endorse the proposal of a British delegate and MP to appeal again to our State Department for the admission of a peace delegation urging that, in respect to our regulations against the entry of Communist, that Committee be composed entirely of non-Communists.

On my way from Stockholm to Paris I stopped overnight in Copenhagen, where I have many friends, and where I addressed a meeting.

From Copenhagen I went to Goteborg, spoke at a large meeting there and returned the same night by sleeper to Copenhagen, leaving Copenhagen an hour or so later for Paris, just in time to avoid the expiration of my wife's return ticket.

I believe that in going to Moscow I was violating no regulation, for neither Russia nor the countries which I passed were listed, as was Yugoslavia, as not to be visited.

The unexpectedness of my trip to Moscow is evidenced by the fact that my round-trip transportation was valid for only two weeks and that, in consequence, I had to have it extended to make the trip. Because my trip abroad was extended my wife, who had not expected to come, joined me in Stockholm. At any rate, if I was guilty of violating a regulation, I can assure you that it was quite unintentional on my part. That I had been to Moscow I did not leave to be discovered on my passport, for my letter to you last May from Stockholm was written to correct a misrepresentation by the press of a statement I had made in Moscow.

As I have written in my earlier letter of today, the deadline on my reservation is Monday noon. I would appreciate being informed by telephone, at my expense, of your decision in the matter of my passport. And if my reply to your questions is deemed satisfactory and the extension is granted I would appreciate my passport and my wife's being mailed by air mail not later than Monday afternoon.

I regret any inconvenience to you this most urgent request on my part may entail.

Sincerely yours,

ROCKWELL KENT

RK/s
uopwa

AFFIDAVIT

I hereby depose that the statements in the above letter are true.

Signed /s/ ROCKWELL KENT

Signed and sworn to before me this 4th day of August, 1950.

Notary Public.....

Exhibit "6"

25 DEPARTMENT OF STATE
WASHINGTON

August 11, 1950

In reply refer to:
130 - Kent, Rockwell

Mr. Rockwell Kent,
Ausable Forks,
New York, New York.

Dear Mr. Kent:

Reference is made to your letter of August 4, 1950 regarding your use of your passport for travel to countries for which it was not valid and to your telephone conversation with the Chief of the Passport Division.

Your passport on Page 13 bears a validation in which it is specifically stated that the passport was not valid for travel in any country except the British Isles, France, Sweden, Norway and Denmark and necessary countries enroute. On the back cover of your passport is printed under the heading "CAUTION" a paragraph as follows:

> "A person to whom a passport has been issued, who uses or attempts to use it in violation of the conditions or restrictions contained therein, may have the protection of the United States withdrawn from him while he continues to reside abroad and may be liable for

prosecution under the provisions of Section 221 of Title 22, United States Code."

Section 221 of Title 22 of United States Code which is referred to above is now included in Section 1544 of Title 18 of the United States Code.

In veiw of the foregoing your passport cannot be further validated.

Sincerely yours

/s/ WILLIS H. YOUNG,
Willis H. Young
Acting Chief, Passport Division.

Exhibit "12"

31 DEPARTMENT OF STATE
WASHINGTON

In reply refer to:
F130 - Kent, Rockwell

June 29. 1955

Mr. Rockwell Kent,
Ausable Forks,
New York.

Dear Mr. Kent:

The Department refers to the application for a passport which you executed on June 1, 1955.

I regret to inform you that after careful consideration of your application for passport facilities, the Department of State is obliged to disapprove your request tentatively on the ground that the granting of such passport facilities is precluded under the provisions of Section 51.135 of Title 22 of the Code of Federal Regulations. A copy of the pertinent Regulations is enclosed for your information.

In cases coming within the purview of the Regulations above referred to, it is the practice of the Depar ment to in-

form the applicant of the reasons for the disapproval of his request for passport facilities insofar as the security regulations will permit. In your case it has been alleged that you were a Communist.

The Department has concluded that your case also falls within the scope of sub-sections (b) and (c) of Section 51.135 of the Regulations. It is the opinion of the Department that the evidence indicates on your part a consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line for an extended period of time.

It has been alleged that you have been affiliated with numerous Communist front organizations, evidence of such affiliations has been corroborated by periodicals, publications issued by the organizations, and witnesses. Your interest in and espousal of the Communist cause dates from at least 1936 when you wrote an article for the "New Masses" which concluded with the statement "to be a true American a man must have the will to right our social wrongs. How is his concern. For me the way is Communism." Your interest in Communism and your sympathetic support for the Soviet have been expressed in your prolific writings published both in the Communist and non-Communist press and your speech making and public appearances sponsored by such Communist front organizations as the American Youth for Democracy; the International Workers Order; the National Council of American-Soviet-Friendship; the American Council for the Protection of the Foreign Born; the Trenton Emergency Civil Rights Conference and the Civil Rights Congress; your willingness to lend your name as sponsor to Communist fronts such as the Abraham Lincoln Brigade; the American Peoples Meeting; the Peoples Radio Foundation; the National Federation for Constitutional Liberties; the Committee for Free Political Advocacy; the World Peace Congress; the National Council of the Arts, Sciences

32

and Professions; the American Peace Crusade; and the diverse official positions held by you in these organizations. You allegedly served terms as President of the United American Artists and the International Workers Order; as Board Member of the Peoples Radio Foundation; and as Chairman of the National Committee for the Defense of Political Prisoners.

You were alleged to have been a long time subscriber to the "Daily Worker", "The Worker", and the "U.S.S.R. Information Bulletin"; and you repeatedly include nationally known Communists among your friends and house guests.

It has been further alleged that in 1950 you used your passport in violation of the restrictions contained therein and travelled to Czechoslovakia, Russia and Finland. The passport was valid only for travel to the British Isles, France, Sweden, Norway and Denmark. While in Russia your activities were described as detrimental to the interests of the United States. According to Moscow reports while you were within the walls of the Kremlin as one of a delegation of American fellow travelers attending a meeting of the Communist sponsored World Committee of Peace Partisans, your contribution to world peace was an attack upon your Government. You reportedly made such statements as "The American Government is not my Government" and, "I am interested in the peace movement because it is backed by Communists. Anything that the Communists say about peace sounds good to me." You were also alleged to have laid a wreath at the grave of John Reed, a founder of the Communist Party in this country, during your unlawful sojourn in Russia.

It has been alleged that you were a speaker at a dinner in 1954 in honor of Eslanda and Paul Robeson held by the New World Review which has been cited as a Communist front; that you were a sponsor of a four page petition addressed to Attorney General Herbert M. Brownell

criticizing the use of paid informers. This petition was allegedly described by an officer of the Communist Party to be regarded as Communist Party activity. It has been alleged that you appeared often at special committee meeting of the Communist Party in Chicago and that you were closely associated with officers of the Civil Rights Congress. You allegedly made a speech in 1952 in which you urged that Communists in the United States must be defended. It has also been alleged that you sought the repeal of the Walter-McCarran Law; advertised in the "Daily Worker" as a speaker at a memorial meeting for Premier Joseph Stalin; urged clemency for Rosenbergs; wrote letter defending Russia against charges of imperialism; participated in rally in honor of V. J. Jerome, Smith Act Subject; and urged release on bail of Steve Nelson who was convicted of sedition in Pennsylvania.

Your alleged participation in the following Communist activities indicates a following of the Communist Party line by you for years past; in 1937, speaker at symposium sponsored by American Committee for Anti-Nazi Literature; chairman of a meeting held under the sponsorship of the Friends of the Abraham Lincoln Brigade and
33 the American League for Peace and Democracy; in 1938, one of the Grand Marshals scheduled to lead the "March for Peace" at New York City sponsored by the American League for Peace and Democracy; member of the Citizens Non-Partisan Committee for Marcantonio to promote the candidacy of Vito Marcantonio, Congressman; member of "Citizens Committee to Support Israel Amter", Communist Party candidate in New York; in 1939 part of a delegation that appeared in Washington, D. C., to interview Senators on the Spanish Policy, sponsored by the Theater Arts Committee, the League of American Writers and the Musicians Committee to Aid Spanish Democracy; participated in May Day Parade; in 1940, signer of a petition to Governor Olson of California petitioning that Sam Darcy, a Communist extradited to

California for prosecution for perjury, be "freed"; in 1941 signer of a statement sponsored by the National Federation for Constitutional Liberties denouncing H. R. 1776; participated in May Day Parade; protested the U. S. Supreme Court's decision sustaining the conviction of one William Wiener, a Communist, on "trumped up" charges; visiting lecturer at White Mountain Writers Conference sponsored by the League of American Writers; endorser of the American Peoples Meeting at New York City; "Daily Worker issue" June 4, 1941, stated that you would speak at a Communist meeting; speaker at the 1941 Congress of American Artists Congress; active in the Schappes Defense Committee to defend Morris Schappes, a New York school teacher who was an admitted Communist; sponsor of a conference held at the Riverside Plaza Hotel to launch a city wide drive to free Earl Browder; in 1944 addressed a letter to President Roosevelt requesting his intervention in the current deportation of Mrs. Earl Browder; in 1945 signer of a statement printed in the "Daily Worker" supporting the eligibility of Communists in the Army for Commissions; Chairman of a Committee formed to sponsor support for the "Daily Worker" and the "Worker" and planned a campaign to raise $100,000.00 (you allegedly made the statement at a meeting of this committee that you had been able to think right during the years of the past due to the fact that you sought guidance in the column of the "Daily Worker"); aided in the launching of the People's Radio Foundation; sponsor of a group formed to support the re-election of Congressman Benjamin Davis, Jr., Chairman of this Committee was Paul Robeson; in 1946, speaker at a meeting sponsored by the National Council of American-Soviet Friendship; in 1948, sponsor of the Arts, Sciences and Professions for May Day; in 1949, sponsor for the "Committee for Free Political Advocacy" organized for the purpose of protesting the prosecution of the twelve Communist Party leaders in New York; spon-

sor of a United Labor and Peoples Conference for May Day to be held on March 26, 1949; sender of letter as President of International Workers Order to Judge Medina protesting the jailing of three Communist Party leaders who were under trial; signer of letter appealing to members of International Workers Order to contribute to a defense fund for the indicted leaders of the Communist Party; in 1950, signer of a petition sponsored by the Peace Information Center urging ban on use of atomic bomb; signer of a statement sponsored by the National Council of Arts and Sciences; speaker at the National Conference to Defend the Bill of Rights; in 1951, one of the founders of the American Peace Crusade; present at the founding meeting of the Peace Information Center and named its advisory counsel.

34 Under Section 51.137 of the Regulations you may present your case and all relevant information informally to the Passport Office. If you desire to take advantage of this provision you may appear before a hearing officer of the Passport Office and you may be represented by counsel. In such case, you will be required to submit a sworn statement as to whether you are now or ever have been a Communist.

If you do not desire a hearing, the Department will give consideration to any written statement under oath which you may desire to submit concerning the matter, provided that you include therein a statement as to whether you are now or ever have been a Communist.

You are assured that any information or evidence which you may supply will receive most careful consideration and that every effort will be made to act upon your application promptly and justly. The Department desires to emphasize that the passport records are confidential Government records and any information which you may submit or which may be received from other sources in connection with your application will not be made known to

the public or to any unauthorized person unless you release it. The Department reserves the right to disclose factual information to supplement or correct any statement which a passport applicant may release for publication concerning the reasons why he was denied a passport or the Department's action in his case.

If a reply to this letter is not received within thirty days, it will be assumed that you do not wish to have your case reconsidered at this time.

Sincerely yours,

For the Secretary of State:
/s/ FRANCES KNIGHT
Frances G. Knight
Director, Passport Office

Exhibit "13"

35

Your Ref:
F130—Kent, Rockwell

July 2, 1955

Miss Frances G. Knight, Director
Passport Office
Department of State
Washington, D. C.

Dear Miss Knight:

My recent request for a passport was, as I stated in the accompanying letter, to attend the Peace Assembly in Helsinki, Finland, which was to open on June 22nd. Consequently, your letter of June 29th, infoming me that a passport would not be granted me is merely a verbal confirmation of an accomplished fact. I need hardly call your attention to the action on my application having been taken in seeming disregard of the recent decision of the

Federal Court of Appeals that no citizen could be deprived of a passport without due process of law.

That the Passport Office, having without a hearing declared me "guilty" and imposed its penalty, offers me an opportunity to prove my "innocence", and that the Board, or jury, before which I am invited to appear to plead my cause has been selected by the very authority that wrote the rules and made the ruling on them, strikes me as nothing less than grotesque disregard for basic principles of American justice.

Of the nature of the charges upon which the denial of my passport is based I will only say that a number suggest their resting upon "information" obtained through such illegal means as wire-tapping and the opening of mails and to conclude that the Department of State, in availing itself of "information" so obtained, may be held guilty of subornation.

A passport, as the recent court decision made clear, is the right of every American citizen. It is no more than an official certification of fact. The Department of State, having no authority under our Constitution to forbid a citizen to travel in foreign lands—except, as the Court has ruled, by due process of law—has circumvented this restriction upon its authority by taking advantage of the fact that most foreign countries make such evidence of citizenship a prerequisite to entry. The action of the State Department in withholding passports for the purpose of preventing travel is parallel to the frequent attempts made by the United States Post Office Department to establish itself as a bureau of censorship through limiting the travel rights of mail.

36 Just as the recent ruling of the Federal Court of Appeals has shown the Passport Office to have been guilty of violation of laws in the past, so, I predict, will a future ruling find that the withholding of passports from

American citizens on any ground whatever to be in open violation of the Ninth Amendment of our Constitution.

Faithfully yours,

ROCKWELL KENT

RK/sj

Exhibit "14"

38 DEPARTMENT OF STATE
WASHINGTON

In reply refer to
F130—Kent, Rockwell

July 19, 1955

Mr. Rockwell Kent,
Ausable Forks,
New York.

Dear Mr. Kent:

Your letter of June 24, 1955 addressed to the President of the United States has been transmitted to this office for attention. It has been made a part of the permanent records of the Passport Office.

On June 29, 1955, the Department notified you that the passport application which you executed on June 1, 1955, was tentatively disapproved on the ground that the granting of such passport facilities was precluded under the provisions of Section 51.135 of the Passport Regulations.

The Department regrets the delay in making the above decision. However, much research was required as your alleged background of Communist activities and affiliations covers a period from at least 1936 to date.

The details of the allegations concerning your Communist activities and the reasons for tentatively refusing

passport facilities to you were related in the Department's letter of June 29, 1955.

In the event that you are of the opinion that you are entitled to passport facilities under the Regulations, you may submit to the Department an affidavit stating whether you are now or ever have been a member of the Communist Party and it should include a complete explanation of your alleged Communist activities as set forth in a previous letter from the Department to you. You may also present your case informally before hearing officers of the Passport Office if you so desire.

Sincerely yours,

/s/ FRANCES G. KNIGHT
Frances G. Knight
Director, Passport Office

Exhibit "17"

41 DEPARTMENT OF STATE
WASHINGTON

In reply refer to
F130—Kent, Rockwell

Sep. 14, 1955

Mr. Leonard B. Boudin,
Rabinowitz & Boudin,
25 Broad Street,
New York 4, New York.

Dear Mr. Boudin:

Reference is made to your letter of September 2, 1955 in which you requested a final decision by the Department in the case of Rockwell Kent.

The record of Mr. Kent's case is in the process of being reexamined by various officers of the Department and a

report of evaluation is expected to be forthcoming in the near future.

You will be notified when a decision is reached.

Sincerely yours,

/s/ FRANCES G. KNIGHT
Frances G. Knight
Director, Passport Office

Exhibit "20"

44 DEPARTMENT OF STATE
WASHINGTON

Sep. 29, 1955

In reply refer to
F 130—Kent, Rockwell

Dear Mr. Boudin:

The Department has received your letter of September 20, 1955 with further reference to the passport case of Rockwell Kent.

You are informed that this office is not in a position to take further action on Mr. Kent's case pending the report of its evaluation by another office of the Department. However, in the meantime, this office will accord Mr. Kent an informal hearing of the nature outlined in Section 51.137 of the Passport Regulations if he wishes to make any statement in explanation or denial of the allegations set forth in the Department's tentative refusal letter.

Sincerely yours,

FRANCES G. KNIGHT
Frances G. Knight
Director, Passport Office.

MR. LEONARD B. BOUDIN
Rabinowitz & Boudin
25 Broad Street
New York 4, New York

17 **Exhibit "23"**

October 27, 1955

Mr. Scott McLeod
Administrator
Bureau of Security and Consular Affairs
State Department
Washington, D. C.

Dear Mr. McLeod:

This will confirm my telephone conversation of today with Orson Trueworthy, your Special Assistant.

I had requested action upon the passport application of my client, Mr. Rockwell Kent, which has been pending since June of this year. Mr. Trueworthy telephoned me to suggest that an informal hearing be held on November 4, 1955.

I advised Mr. Trueworthy that we desired to attend any conference, informal hearing or hearing, which would result in a final decision upon Mr. Kent's request for a passport. However, my client has taken the position that the Passport Office's demand for an affidavit under Section 51.142 of the Regulations is unlawful and that for that reason and as a matter of conscience, he will not respond to such a demand.

The Passport Office has taken the position in other cases that unless the passport applicant executes such an affidavit, there is no point to a hearing, since it will neither issue a passport, nor render a final decision. Similarly, the Board of Passport Appeals has taken the position that in the absence of an affidavit and of a final decision, it will not entertain an appeal.

I should like to be advised by you, by return mail if possible, whether my understanding of the situation as set forth above, is correct. Obviously, there is no point to a hearing if we are advised in advance that following it, we will receive neither passport nor decision.

On the other hand, it would be most unfair if the Department in litigation which will follow would assert that it

would have given us a hearing and decision even without the affidavit if we had requested such a hearing.

I am sure that the Department would not wish this misunderstanding to occur. Therefore, would you be kind enough to advise me that my statement of the Department's position is correct, and that it will not be claimed that Mr. Kent withdrew or waived his right to an informal hearing which could not result in a passport or decision.

I understand, of course, that the Department will argue in the ensuing litigation that the affidavit requirement is a lawful condition to a hearing and decision; our position will be to the contrary.

Sincerely yours,

LEONARD B. BOUDIN

LBB:RP

Exhibit 24

TRANSCRIPT OF HEARING

[The interview was opened at 2:25 p.m.]

Mr. Nicholas: This is an informal hearing as provided in Section 51.137 of Title 22 of the Code of Federal Regulations in the case of Mr. Rockwell Kent, an applicant for a passport.

Mr. Johnson, will you proceed?

Mr. Rein: May I ask a question first? I don't know, Mr. Nicholas, whether you got the message I left in your office earlier today, but I noticed in going over the correspondence or the letter that was last sent to Mr. Kent that there was some reference to something on an earlier passport of Mr. Kent's, a certain restriction on that passport, and I have asked Mr. Kent about it. Mr. Kent says he has no recollection of ever having seen it. And I asked, but he doesn't have it to check it, whether we could have a copy, not a copy but that passport here, so we could look at it.

Mr. Nicholas: I got your message too late to get the passport. The passport isn't in the building. It has been

sent away and we didn't have a chance to get it, you see. If we had gotten your message a couple days sonner we would have had it here. We have here the record of the issuance and the record of the extension. We can
2. show you the files, showing what passport facilities were granted both times. It was a case, as I recall, of Mr. Kent being issued a limited passport for one trip and then extended for another trip, made valid for certain countries. Does that agree with your recollection, Mr. Kent?

Mr. Kent: My recollection, that is all. But I haven't seen the passport since I sent my passport to Mrs. Shipley and didn't get back what I paid for.

Mr. Nicholas: We will get the passport and let you examine it, but we were not able to get it for today.

Mr. Rein: Well, it is probably not of any real significance, but I did discuss it with Mr. Kent and Mr. Kent told me, I think he has already written a letter, which you have in the files, concerning the business of a trip he made to some other countries, and he says he has no recollection of this limitation on page 13. I will ask Mr. Kent now about that.

Mr. Kent: I will state that now.

Mr. Rein: Not that he just doesn't remember it now, but he doesn't recall ever having seen it. Perhaps he hasn't read that far, I don't know.

Mr. Kent: I remember a beautiful green ink stamp "Not good for Yugoslavia", but that is all of that sort I remember in the passport.

3. Mr. Nicholas: Well, we will get the passport later and let you look at it and we will notify Mr. Rein when we get it. But now we have the applications and various things which we are going to show you and put in the record. So, Mr. Johnson, will you go ahead now?

Mr. Johnson: Mr. Kent, we have here an application which indicates it was executed on June 1, 1955—

Mr. Kent: Yes.

Mr. Johnson: —at Elizabethtown, New York.

Mr. Kent: That's right.

Mr. Johnson: I'd like to show you this application, Mr. Kent, and ask you whether or not that is the application you executed on that date? [Showing Mr. Kent the application]

Mr. Kent: That's right, that is it.

Mr. Johnson: I'd like to offer this as part of the passport record.

Mr. Rein: I have no objection. I'd just like to look at it for a second.

Mr. Nicholas: All right, without objection, that will be a part of the record.

[Dept. of State Passport Application Form DSP-11, together with photograph of Rockwell Kent, dated June 1, 1955, was admitted in evidence and marked as Exhibit 1.]

Mr. Johnson: I'd like to show you, Mr. Kent, a passport application which was executed on August 2, 1955, at Plattsburgh, New York, and also a letter dated August 2, 1955, and signed "Rockwell Kent", referring to the application and also referring to what I presume is this application (indicating Exhibit 1) of June 1, 1955. The opening sentence states, however, "On May 28th I made application", which I think is probably in error because this is probably the one you're referring to.

Mr. Kent: I don't know why there is a difference in date.

Mr. Johnson: Well, here is the application of August 2 and also the letter to which I refer and I will ask you if you can identify that. [Handing the application to Mr. Kent.]

Mr. Kent: That is it.

Mr. Rein: I have no objection. You can go ahead.

Mr. Nicholas: Without objection, that will be admitted in evidence and made a part of the record.

[Dept. of State Passport Application Form DSP-11, dated 2 August 1955, together with typewritten letter signed "Rockwell Kent" to the Passport Office, dated

August 2, 1955, and photograph of Rockwell Kent were admitted in evidence and marked as Exhibit 2.]

Mr. Johnson: On June 29, 1955 the Passport Office directed to you, Mr. Kent, a letter setting forth the reasons for the denial of passport facilities to you. It specifically referred to the passport of June 1. I wonder if you or your counsel will stipulate that this letter would also be on the same basis as the application of August 2, as applied to the both applications that we have here.

Mr. Rein: Well, yes. As I understood it, we got a letter from Mr. Cartwright that said that we could assume that there was a tentative denial on August 2 on the basis of the letter of June 2, and that is perfectly agreeable.

Mr. Kent: Since they were for different purposes. But my position is that the purpose is—

Mr. Rein: Well, that letter doesn't refer to the purposes of your trip, Mr. Kent. It refers to the organizations you belong to and presumably the State Department position is they don't care what the purposes of your trip are.

Mr. Kent: Yes.

Mr. Johnson: I have a copy here of this letter. I wonder, for the purposes of saving time, if we could admit the letter into the record and make it a part of the record and when the reporter transcribes the case, if she will just set forth the letter in its entirety as part of the record, if that will be all right.

Mr. Rein: Is this the one we had a photostat of?

Mr. Kent: I didn't read it all. I guess it's the letter.

Mr. Rein: [Examining the letter] Yes, it seems to be.

Mr. Nicholas: Without objection, it is admitted in evidence.

Mr. Rein: Let me ask you. I think you want to make it clear that this letter is also to be considered, even though it's earlier in date, in reply to the August passport application?

Mr. Johnson: That is it exactly.

Mr. Nicholas: It will be considered as the grounds for the tentative refusal of both applications.

[Carbon copy of 5-page typewritten letter dated June 29, 1955, from Frances G. Knight to Mr. Rockwell Kent, was admitted in evidence and marked as Exhibit 3.]

Mr. Johnson: I'd also like to show Mr. Kent a letter dated June 25, 1955, and addressed to the Passport Division, Department of State, signed "Rockwell Kent", in which was transmitted a press bulletin, a mimeographed copy of what purports to be a press bulletin published by the Information Service of the Secretariat of the World Council of Peace. I'd also like this to be admitted as part of the record and I will ask Mr. Kent whether he recognizes that. [Showing the letter and press bulletin to Mr. Kent]

16 Mr. Kent: Yes, that is part of it.

Mr. Rein: I'm sure that Mr. Kent has no objection to any letter he has ever sent going in the record, but I would like to indicate that on the surface this has no relevance to the present passport application because it refers to a purpose in a previous application which has already expired, whatever it may be. In other words, the application in May was to attend a specific conference June 22nd, was it?

Mr. Kent: June 22 it opened.

Mr. Rein: June 22, and it is already over, so the present application could have no reference to a conference which has already ended. As I say, from that point of view, it seems to me it is irrelevant.

Mr. Johnson: Maybe at this time I will refer back to the application of June 1, 1955, which indicates that the countries to be visited are Finland and England, and the purpose of the trip was to attend a peace conference.

Mr. Rein: Well, that is perfectly right. My only point is that that has been aborted by Mr. Kent's failure to go.

Mr. Johnson: Yes, sir.

Mr. Rein: And the present application has no reference to attending any peace conference because that par

17 ticular peace conference which Mr. Kent wished to attend has been held and is all over.

Mr. Kent: May I look at this just a moment?

Mr. Johnson: Yes, sir. [Handing the letter and press bulletin to Mr. Kent.]

Mr. Rein: That ought to be clear.

Mr. Johnson: Well, the application of August 2, 1955 shows that the countries to be visited are England, Ireland, France, Switzerland, Denmark, Norway, Sweden, Finland, Italy, Czechoslovakia; and the purpose of the trip "prosecution of profession and pleasure". I think that covers it.

Mr. Rein: May I ask Mr. Kent just a question or two that I think would clarify this? I wonder if you would tell now for the record, Mr. Kent, what you told me in your office, that when you first filled out this application you just wanted to put down European countries.

Mr. Kent: Yes, sir.

Mr. Rein: I wonder if you would clarify that.

Mr. Kent: I live on the borderline of two counties, one is Essex County and the other one is Clinton. The previous application was made at the Essex County office at Elizabethtown. But we happened to be going to Plattsburgh, which is a shopping center and when I was
18 there I went to the County Clerk there and when I said, "I want to visit European countries", he said, "You can't do that. I got to have the names of all the countries." I said, "I don't know. I want to go to Europe and travel around." He said, "Nope, you got to give me the names." So I just gave him names while he was typing until the thing was filled up. I might have gone on indefinitely. I could have thought of all the countries in Europe. Not that I intended to go to all of them, but I wanted a passport to go where I pleased. He said, "I also don't want to be pulled into court for this." I said, "Don't worry, you won't be pulled into court."

Mr. Rein: In other words, to make it clear, when you put down certain European countries it was just to satisfy the clerk and you merely meant your passport to be valid

for travel in Europe, including all countries without any countries specifically, and that is what you would like your application to cover?

Mr. Kent: Exactly. There is another question I'd like to ask. Not hearing from the Passport Office, I wrote to the President, and I believe that that letter was sent to the Passport Office. If it has been, I'd like to have it in the record.

19 Mr. Nicholas: Well, suppose we look to those things directly and let Mr. Johnson go ahead with putting these things into the record. I think this letter of June 15, 1955 and its enclosure is pertinent to a certain extent. It showed what Mr. Kent intended to do on the trip when he made the first application.

Mr. Rein: Surely. We have no objection.

Mr. Nicholas: That is the only purpose.

Mr. Rein: We have no objection for it being in there for what it is. I make it perfectly clear and I'm sure Mr. Kent would want to make it perfectly clear too, if there were another peace conference he would want to attend and would want to go. He is not withdrawing from that, but I want to make it clear the present application has no reference to the peace conference. I don't want to indicate, Mr. Kent, that you are withdrawing from your desire to go to another peace conference.

Mr. Kent: If one were held, I would want to go. I'm for peace.

[Typewritten letter dated June 15, 1955, signed by Rockwell Kent, addressed to Passport Division, Department of State, together with Press Bulletin dated June 9, 1955, was admitted in evidence and marked as Exhibit 4.]

20 Mr. Johnson: I'd like to show Mr. Kent a passport application which shows that it was executed on April 14, 1949, at New York City and ask him whether he executed that application. [Showing the application to Mr. Kent]

Mr. Kent: I will just look at my signature. That is mine, yes.

Mr. Rein: Well, I have no objection to its going in. I just want to examine it for my purposes of my own information.

Mr. Nicholas: Without objection, it is admitted.

[Dept. of State Passport Application Form DSP-11, dated April 14, 1949, together with photograph of Rockwell Kent, was admitted in evidence and marked as Exhibit 5.]

Mr. Johnson: The application to which I have just referred shows that the countries to be visited were France and England, and the purpose of the trip was "Attending Peace Congress in France. Visit wife's relatives in England." In connection with that application, I'd like to show Mr. Kent a letter addressed to the Department of State, Washington, D. C., dated April 14, 1949, New York, and ask him whether he has seen that letter and can he identify it. [Showing the letter to Mr. Kent.]

21 Mr. Kent: Yes.

Mr. Johnson: I'd like to admit this letter in evidence.

Mr. Nicholas: Without objection, it is admitted.

[One-page handwritten letter dated April 14, 1949, to the Dept. of State, from Rockwell Kent, was admitted in evidence and marked as Exhibit 6.]

Mr. Johnson: Mr. Nicholas, I will have to ask your assistance on this. I will show you some records of the Passport Office in connection with your application, Mr. Kent. You can tell here that the passport was issued [indicating Exhibit 5.]

Mr. Nicholas: This passport was issued in New York City on April 14, 1949, which shows "Approved, Mr. Nicholas and Mr. Siegel." This attached paper, which was initialed by Mr. Siegel, covers the authorization to the

Passport Agency to issue the passport, and it said, "Authorize 60 days British Isles, France." So the passport which you received at that time in 1949 was valid for 60 days and for travel to the British Isles and France.

Mr. Kent: Yes.

Mr. Nicholas: That was in accordance with your request contained in this letter of April 14, 1949 [indicating Exhibit 6], saying that you wanted to go to France to attend the World Congress for Peace and to England to visit your wife's relatives.

Mr. Kent: That's right.

Mr. Nicholas: Without objection, that will be admitted in evidence.

[One-page handwritten authorization by Mr. Nicholas and initialed by Mr. Siegel, was admitted in evidence and marked as Exhibit 7.]

Mr. Nicholas: Then here is a letter from Mr. Louis E. Spiegler, Attorney at Law, dated February 27, 1950, requesting an extension of the passport issued to you in 1949, Mr. Kent. This paper, which is attached and headed "PP 2501, NYS, Rockwell Kent", is a paper which I made out on February 27, 1950, authorizing the validation of your passport for travel in France, British Isles, Sweden, Norway, and Denmark.

Mr. Kent: Yes.

Mr. Nicholas: And that passport was picked up in the Department, presumably by Mr. Spiegler or Mr. Alpher, who represented you, and you received the passport.

Mr. Kent: Oh, yes, I did. It was a rush thing and I was told—I have never met Mr. Spiegler, but I was told a Washington lawyer could get it through quickly.

Mr. Nicholas: Any objection to that being admitted in evidence, Mr. Rein?

Mr. Rein: No, no objection.

Mr. Nicholas: Without objection, that letter and paper are admitted in evidence.

[One-page typewritten letter dated February 27, 1950, to Mrs. Ruth B. Shipley, signed by Louis E. Spiegler, with a handwritten notation at the bottom signed by S. M. Alpher, together with a handwritten paper dated 2-27-50, initialed AJN, was admitted in evidence and marked as Exhibit 8.]

Mr. Rein: I just want to make one question to Mr. Kent. You never saw this correspondence?

Mr. Kent: No. That was addressed to Mrs. Shipley; no, I never saw that.

Mr. Nicholas: Mr. Spiegler wrote the letter?

Mr. Kent: That is the first time I have seen it.

Mr. Rein: What communication did you have with Mr. Spiegler with reference to this? Do you recall what communication you had with him?

Mr. Kent: No, I think I must have told him the countries that I intended to travel through.

24 Mr. Rein: Were you abroad at the time?

Mr. Kent: No, I was in New York. As I recall it, the passport arrived just about the last minute. There wasn't much time. He got it through quickly. Yes, they sent a special messenger and met me at the airport with the passport. It was really a rush job.

Mr. Rein: Do you have any recollection of your conversation with Mr. Spiegler?

Mr. Kent: I don't think I ever spoke to Mr. Spiegler. I think that I wrote him. I may have phoned him, but I think I wrote to him.

Mr. Rein: Let me ask one other question. What you would have written to him was substantially what he wrote to the State Department, or don't you recollect?

Mr. Kent: [Examining Exhibit 8] Yes, that's correct. That is just what I would have asked for—presumably did.

Mr. Rein: I think that makes it clearer.

Mr. Nicholas: Yes. And you received what you asked for, Mr. Kent?

Mr. Kent: Yes. I guess you gave it to me.

Mr. Nicholas: Yes.

Mr. Johnson: Mr. Kent, I have here a, shall we say, volume [indicating Mr. Kent's book, "It's Me O Lord"].

25 Mr. Kent: I had hoped you bought it. It cost $10 and I would get a dollar out of it.

Mr. Johnson: It's $7.50, isn't it?

Mr. Kent: No, $10 and worth $12.50.

Mr. Johnson: I'd like to offer this book in evidence and I will identify it. It is entitled "It's Me O Lord", the autobiography of Rockwell Kent, published by Dodd, Mead and Company at New York, and—

Mr. Kent: In 1955.

Mr. Johnson: —and copyrighted in 1955 by Mr. Kent.

Mr. Rein: I'd like to make a few comments.

Mr. Johnson: Do you mind—I'll offer this and refer to various passages in the book and maybe ask Mr. Kent if he wishes to make any comments in addition to what he has in his book concerning the various excerpts which I will read to him.

Mr. Rein: I think we can make our position clear in advance and maybe save some time. I'm sure Mr. Kent is happy to have the State Department read the book and he certainly stands behind the book.

Mr. Kent: Yes, I do!

Mr. Rein: But I take the position in behalf of Mr. Kent—and I will ask him to repeat it—that anything that appears in the book will not be at all relevant to

26 whether or not he gets a passport, although he is certainly very glad to have anybody in the State Department read the book. I want to indicate that I have, under force of circumstances, to make a sort of limited objection on the ground that we don't see where it has any bearing on this proceeding; although, on the other hand, we are perfectly happy to have the State Department read it. I think the position is clear. Perhaps Mr. Kent might want to add a word on it.

Mr. Kent: That is my position exactly. I'm an American citizen and I look upon a passport as an official certification of my citizenship.

Mr. Nicholas: I think—

Mr. Johnson: I'd like to offer it and, as I have said before, I'd also like to read some excerpts from the book.

Mr. Nicholas: Conceding that Mr. Kent wrote the book—

Mr. Rein: There is no question about that!

Mr. Nicholas: I think that it is pertinent, or rather could be pertinent on the question of whether his case falls within the present Passport Regulations. And for that purpose it will be admitted in evidence. I don't think that is exactly the point you had in mind, Mr. Rein.

27 I think you had more in mind, regardless of our Regulations, that he is entitled to a passport.

Mr. Rein: That's correct.

Mr. Nicholas: But this is relevant to the question of whether his case falls within the Regulations.

Mr. Rein: I want to make it clear that we object to the book being brought into evidence, but I don't want you to draw any conclusion from that that Mr. Kent wishes to withdraw from or disavow or not stand behind anything he said in the book. The position should be clear. We just don't think it's any business of the State Department in connection with getting him a passport. I won't say it isn't the business of the State Department in any other connection, because I think it's a good book for the State Department to have.

Mr. Kent: That is exactly my position.

Mr. Nicholas: [Off-the-record discussion]

Mr. Johnson: Mr. Kent, in your book on pages 483 and 484 you recite a set of circumstances surrounding the unauthorized rental, I suppose, of your home there at Au Sable Forks. I think there was some undesirable tenant or the fact you didn't want the property leased. I believe that was the question.

Mr. Kent: I'm glad to discuss the book.

28 Mr. Johnson: Just a moment. And then you refer to the fact that the rental you received, which amounted to some hundreds of dollars, let's see, you sent $800 of it to the Communist Party. You looked the Communist Party up in the phone book and then you mailed a check to them. Then you recite in your book the statement, "A substantial part of the money, Browder wrote me, would be devoted to the defense of Tom Mooney. That, with the thorough fumigation of our house which Frances, at my request, had seen to, wiped the stain from Asgaard." I'd like to know whether that statement is a correct statement of your donation of $800 to the Communist Party at that time?

Mr. Kent: It—

Mr. Rein: One second, Mr. Kent, before you answer that. I don't want to interrupt—you can add anything you want to say—but I think we made clear that in order to cut this short, I think Mr. Kent has indicated that he stands behind everything in his book, but we can't concede the relevancy of any of these matters to this particular hearing, and Mr. Kent is not going to go into it and discuss it. I'm sure that Mr. Kent is anxious, however—outside of the connection with the passport hearing, because his principle is that it has no relevancy—I'm sure he will be perfectly happy to talk about that with
29 you or anybody else, as he obviously has. I don't know if you want to—I'm also making the suggestion, Mr. Johnson, on the theory that perhaps it might show up in the hearing, I don't know.

Mr. Johnson: Well, there are certain passages in the book which I feel that maybe Mr. Kent would like to comment upon or give any additional explanation he might have concerning them, other than what appears in his book. That is why I'm going along, if you will notice, the letter denying him passport facilities sets off certain grounds—Communist membership, affiliation, etc., and

activity in the Communist fronts. So on that theory I believe the relevancy of these excerpts is apparent.

Mr. Rein: Well, Mr. Kent has made his position clear, I think, in refusing to consider the allegations in the letter. He is not going to depart from that position here.

Mr. Nicholas: Well, now, Mr. Kent, you concede that anything in the book is accurate.

Mr. Rein: I would think so!

Mr. Kent: I do. Though I don't make that concession as evidence in this passport application because I consider it, as Mr. Rein has said, completely irrelevant. Though in defense of my book, everything in the book is as true as I could possibly make it without hurting other people's feelings.

Mr. Rein: Perhaps to help Mr. Nicholas out, if you want a concession of what appears in the book—other than it seems to me is apparent from the face of the book, it has been recently written and Mr. Kent wrote it—if you want a concession in addition to that that it is acurate and true, we would be glad to make such a concession; but we don't think it has any bearing on this proceeding.

Mr. Nicholas: As I said before, I think certain things in the book are relevant to the question as to whether Mr. Kent's case falls within our Regulations. Now, Mr. Rein, you take the position, I think, that our Regulations are invalid.

Mr. Rein: That's correct. I'd also like to indicate, in order to save time that we would be perfectly happy to concede everything that is in the book. I'm certain and perhaps Mr. Kent can indicate whether he agrees with me, that he has no desire in this proceeding to comment on that or to amplify or disqualify or modify anything he has said in the book for the purposes of this record. So I think if you believe that the book is relevant, I think you have the book and we can go on to something else, without wasting time.

Mr. Nicholas: Then suppose, instead of reading into the record anything that you think is pertinent to the question, that we would merely insert quotations from the book in the record and with the understanding that Mr. Kent says whatever is in the book is true?

Mr. Kent: Correct, that's right.

Mr. Rein: You don't particularly care to amplify on it, do you, Mr. Kent?

Mr. Kent: Do I what?

Mr. Rein: You don't particularly want to amplify on it, do you?

Mr. Kent: No, only because my position is that it is irrelevant.

Mr. Rein: Or modify it?

Mr. Kent: No.

Mr. Johnson: I still think on page 493, I would like to read this excerpt, if you don't mind. And, if you will notice, there are not many that I have marked in the book and some of these I won't refer to. I would like to mention to you I would like to spell out in the record certain passages and I think that that would be relevant.

Mr. Rein: As long as our position is clear, as I say, you should read whatever you wish to read.

Mr. Kent: I'm perfectly willing that you should insert the whole book into the record, or any of the passages.

Mr. Nicholas: Suppose you read them to us quickly and we won't interrupt.

Mr. Johnson: On page 493: "It is April of 1954 as I now write. The 'troublemakers' of today, those Communist leaders many of whom were active in the preservation of our democracy in the pre-war decade or heroes in the defeat of Fascism on the battlefield, are safely in prison; many others are on the prison road. Thousands of the men and women whom I have characterized as of good mind and heart have been publicly denounced and stripped of employment and means of livelihood. Intern-

ment camps, we're told, are in readiness for tens of thousands more. Our Attorney General, in a public address, assured the nation that the Government, acting through Congressional committees, spies, police courts, now has the situation well in hand. It is a government well entrenched in power that the Attorney General speaks for. It is the government of all those pre-war supporters of Fascism in America—of all the rich and powerful of that group, down through the little *Fuehrers* and their serried followers to the lowest murderers of the Black Legion. It can't happen here? Don't make us laugh: it almost
33 has. And when, glancing over our Government's official list of organizations, meetings, banquets, petitions, letters, etc., etc. subversive to Fascism here and abroad, I find that since 1935 I'm credited with part in only eighty-five, I am ashamed."

There is also a passage in the book on page 572 which Mr. Kent indicates is an endorsement of Browder and Ford in 1936.

Mr. Kent: I do. And I told why.

Mr. Johnson: And continues—I'll read this portion: "I don't count my endorsement of Browder and Ford in 1936, and my titular chairmanship of the Committee of Professionals for Browder and Ford. Involving no activity on my part, it amounted to an endorsement of principles and a statement of position. The principles I endorsed were outlined in the party platform. Beginning with a statement that we faced a crisis in which 'extreme reaction threatens the country, driving toward fascism and a new world war,' and calling for common action 'to overcome this crisis in an American way . . . in the interests of our people and of our country', it proceeded with a program that, stressing opposition to child labor and Jim Crow, supported the more advanced measures of the New Deal.
34 It was a New Deal platform cleared of the compromises that had marred the New Deal's functioning. With Roosevelt's re-election assured, it

seemed important to emphasize support of his more liberal trends. The Communist election platform did just that."

I'd like to also read a passage from the book on page 584 and it concerns Mr. Kent's trip to Moscow in March 1950, I believe it was.

Mr. Kent: Yes, I think so. I'm a little hazy about dates.

Mr. Johnson: "Our Moscow delegation consisted of thirteen men and women and included, in addition to representatives of several of the west European countries, the Reverend James Endicott of Canada and, from America, one O. John Rogge and me. Accompanying us was the American journalist, Johannes Steel. A New York business lawyer who, following his appointment as Assistant U. S. Attorney General, was sent to Germany to investigate the underlying causes of the war, Rogge had shown some courage in publicizing facts that pointed to or proved the involvement of American interests—inviting thereby just what he received: dismissal. Thrown thus fortuitously into anti-administration ranks, he was embraced by the Progressive Party and rashly elevated to party prominence. Ambitious to 'succeed', he suffered by the party's 1948 defeat and rout; and, now discredited in business circles, he sought employment by the Soviet Union and Poland. He failed; and turning next to Yugoslavia, was hired. If was then, as a paid agent of that country—a *secret* agent in the sense of having kept his new employment unannounced—that he accepted the invitation, and the accompanying tender of expenses, to speak as a representative of the American people before the Supreme Soviet in Moscow. And it was, in effect, as an agent of his new employers that he spoke.

"His speech—purposefully and, I would say impertinently critical of the Soviet Union's internal affairs—was, as I have said, widely publicized in America and hailed by some as an expression of outstanding courage. That it was hardly that is evidenced by the fact of its

having been read in advance by our Russian hosts and, despite its violation of the purpose of our mission, permitted.

"Once—I blush at recounting this episode of my irresponsible youth—high with good cheer and exasperated by a great sign reading SILENCE!, I had yodelled in that holy of holies, the library of the University Club in New York. Well, O. John Rogge, a grown-up man and an ex-Assistant Attorney General of the United States, yodelled in the Kremlin."

36 Mr. Kent: That is just about what it was.

[Blue, cloth-bound book entitled "It's Me O Lord" by Rockwell Kent, was admitted in evidence with leave to withdraw and was marked as Exhibit 9.]

Mr. Johnson: Now, in connection with your trip to Moscow, as you indicate in your book, your appearance and the appearance of Rogge and Steel was very much publicized in the United States.

Now, a digest of the Soviet press dated April 29, 1950, contains this passage. I will read it to Mr. Kent and ask him whether what are stated to be his remarks at the conference are correctly reported or whether they are in fact the gist of what you may have stated at the time. I will read from this digest.:

"The words of Rockwell Kent, American artist and Chairman of the International Workers Order, were received with prolonged applause: 'As a member of this peace delegation and as a fighter for peace', he said, 'I must tell you that I am not an official representative of the American Government. To be honest, I say that this Government is not my government and does not represent me. You Soviet people are in the hearts of many Americans.'"

Now, do you recall that part of your statement?

37 Mr. Kent: I recall it very well.

Mr. Johnson: That was very much publicized.

Mr. Kent: Yes. I will add this—this is not to the credit of the Passport Office—that my prompt repudiation of that translation is in your records. It was in a letter to Mrs. Shipley. It was also published in the *New York Times*. That you, having that in your records here, should refer to this now discredited statement surprises me.

Mr. Johnson: You're just a little too quick. You jumped to a conclusion.

Mr. Kent: All right, but it was written to me in this recent letter from Miss Knight.

Mr. Johnson: I'd like to show you this letter of March 18, 1950, addressed to Mrs. Ruth Shipley and signed "Rockwell Kent" and ask you whether you recall that. [Handing the letter to Mr. Kent]

Mr. Kent: Yes.

Mr. Johnson: I'd like to show you an enclosure to that letter, which is dated March 18, 1950, and ask you whether you recall that. [Handing the enclosure to Mr. Kent.]

Mr. Kent: That is right, that is exactly right.

Mr. Nicholas: That is the letter of correction to which you referred?

38 Mr. Kent: Yes, that was also published in the *New York Times*.

Mr. Johnson: I'd like to read this into the record so that we will be perfectly fair. Since I have read the passage from the book, I intend to read this too.

Mr. Rein. Well, I think you should read it with the indication that Mr. Kent has said the correct version as you're now going to read it according to Mr. Kent's testimony.

Mr. Johnson: That's right. This is a carbon copy of a letter addressed to the Editor in Chief, TASS, Moscow, U.S.S.R.

"Dear Sir:

"The New York Times of March 8th, under a London dateline, quotes TASS as having reported that in a speech in Moscow I had stated that the United States government

is not my government." I have full recollection of my own words in my Moscow speech, and they were as follows:

"'As a member of this peace delegation and as a fighter for peace I must tell you that I am not an official representative of the American Government. I must also say, in respect to my own integrity, that the American government is not representative of me.'

I realize that the words incorrectly attributed to me were due to the difficulties of translation. I would appre-
39 ciate your making public the corrected version of my statement.

"Lest the error in the translation be held as a reflection on the ability of my translator on the occasion of my speech, I would like to state that he was in general an interpreter of unusual competence for whose devoted assistance throughout my stay I am deeply grateful.

"I am, Sir,

"Very truly yours,

"Rockwell Kent"

I'd like to admit these two papers as part of the record.

Mr. Nicholas: Without objection they will be admitted, as modifying the extract which you previously read into the record.

Mr. Rein: As stating the correct version.

Mr. Nicholas: As stating the correct version.

[Typewritten letter dated March 18, 1950 to Mrs. Ruth Shipley, signed "Rockwell Kent", together with enclosure of a letter from Rockwell Kent to Editor in Chief, TASS, dated March 18, 1950, was admitted in evidence and marked as Exhibit 10.]

Mr. Kent: I believe that that is in my book, too.

40 Mr. Johnson: Yes, sir. Mr. Kent, your book also refers to a meeting on July 1, 1953, before the

United States Senate, the Senate Permanent Subcommittee on Investigations of the Committee of Government Operations. That was a committee in which Senator McCarthy and Stuart Symington were present, in addition to others. Your book, on page 611, refers to your appearance before the Senate Committee.

Mr. Kent: Yes.

Mr. Johnson: It gives your stand. You also state that you had given a statement to the press and that it was only the *York* (Pa.) *Gazette* that published your statement.

Mr. Kent: As far as I know. Too bad the Lamont case hadn't come off by then.

Mr. Johnson: I don't have that press statement and Mr. Kent apparently just quotes—

Mr. Kent: I just quote from it.

Mr. Johnson: He quotes excerpts from the statement. But it does concern the hearing before the Committee.

Mr. Kent: No. It doesn't appear, because I would not answer the $64 question of the Senators and, therefore, I was not allowed to introduce my statement.

Mr. Johnson: The statement itself does not appear.

41 Mr. Kent: Does not appear, that's right.

Mr. Johnson: I have here what purports to be an account of that hearing and I'd like to offer this and make it as part of the record. It's headed "State Department Information Program Information Centers", Wednesday, July 1, 1953, United States Senate, Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, Washington, D. C. This report indicates that the Subcommittee met on January 30, 1953 at 10:30 a.m., in Room 318, Senate Office Building with Senators Joseph R. McCarthy, Chairman of the Subcommittee presiding, and at which were present in addition to Senator McCarthy, Senator Stuart Symington and apparently Members of the Senate Staff. There is here an account of the questions that were propounded to Mr. Kent and

his statements in reply to those questions. If there is no objection, I'd like to enter this.

Mr. Rein: Well, I object on the ground I have previously stated, I don't think that it has any bearing on this hearing. [Examining the document] Don't you have an official Committee print you could put in the record?

Mr. Johnson: We will obtain it.

Mr. Kent: My only objection is that the courts have ruled that that whole line of investigation was without authority. So you are submitting a report of a committee which was not authorized to conduct the investigation.

Mr. Rein: This isn't a report. This is what you said at the hearing.

Mr. Kent: Yes, but the hearing was illegal.

Mr. Rein: I would think so. But we don't think it has any bearing on this proceeding anyway. I don't think it adds anything to what you have already got in Mr. Kent's book. I would suggest, if you're going to submit it, you ought to at least submit an official print.

Mr. Nicholas: This is really a copy made from the printed material.

Mr. Kent: Yes, I have the printed record of it.

Mr. Nicholas: You have read it?

Mr. Kent: Yes.

Mr. Rein: We have read the printed record.

Mr. Nicholas: Was the printed record accurate, as far as you know?

Mr. Kent: Yes. I think they did a little editorial—well, they edited it a little, but nothing damaging from my point of view.

Mr. Rein: I think it's correct. I don't want to be technical, but if you're going to submit it for the purpose of anybody reading it, it certainly isn't legible.

Mr. Nicholas: I think it is revelant. His answers rather are relevant to the questions.

Mr. Rein: Including his refusals?

Mr. Nicholas: As to the question whether his case falls within the present Passport Regulations.

Mr. Kent: It almost eliminates my perfectly correct charge that I was there on my own free will, since the subpoena served on me without signature and was of no more value than an unsigned check—but that was soft-pedaled.

Mr. Nicholas: But there were no statements in the printed record you would want to change?

Mr. Kent: No.

Mr. Nicholas: So I think we will admit it for what it is worth, as to whether it comes within the Regulations or not.

Mr. Rein: You will note our objections on the ground as previously stated.

Mr. Nicholas: Yes.

[Transcript of U. S. Senate, Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, dated July 1, 1953, was admitted in evidence and marked as Exhibit 11.]

44 Mr. Johnson: Mr. Kent, your book also has a reflection on your membership in numerous organizations. As I indicated here from the excerpt on page 493 of the book, there are also passages in the book which show your connection and affiliation over a long period of time with the International Workers Order.

Mr. Kent: I was its President.

Mr. Johnson: From, what was it, 1936, I believe wasn't it?

Mr. Kent: I don't know. Whatever is in the book is right.

Mr. Rein: Although he says he is President of the International Workers Order, he is not conceding its relevancy.

Mr. Kent: No, I can't concede the relevancy of any of this, not from my point of view.

Mr. Johnson: And the book also reflects that your membership in the Committee that drafted the Stockholm Peace Appeal—

Mr. Kent: And that I wrote to Secretary Acheson about it and all that, yes, sure.

Mr. Johnson: That is on page 586 of your book.

Mr. Kent: Yes.

Mr. Johnson: Your account of your affiliation with the International Workers Order commences on page 595.

Mr. Kent: I believe that chapter is headed "The Liar", isn't it?

Mr. Johnson: That's right.

Mr. Kent: Referring to Mr. Budenz.

Mr. Johnson: Yes, it is.

Mr. Kent: I have not been sued. It was at that hearing that Budenz answered to a reprimand from the Judge and said, "Well, you have to be careful what you say out of court."

Mr. Johnson: Mr. Kent, under the Regulations, the Regulations provide that you submit a sworn statement relative to your membership in the Communist Party. And, under the Regulations here, Section 51.135, there are various subdivisions; you will notice from the Supplement to the Passport Regulations that Mr. Nicholas has just given you and which your Counsel has here that under Section 51.135 there is a certain limitation on the issuance of passports to persons supporting the Communist movement.

Now, subdivision (a) provides that:

"Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party."

I would like to call your attention to that particular subdivision and ask whether or not you are now willing to submit a sworn statement or a statement subscribed to and sworn to under oath or affirmation as to whether or not you are a member of the Communist Party?

Mr. Kent: You, of course, having read my book know perfectly well that I have already answered that question under oath. But, as a matter of principle, I will not answer it here.

Mr. Johnson: You refuse to submit a sworn statement, Mr. Kent?

Mr. Kent: I do; yes.

Mr. Johnson: Now, under Section (b):

"Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement."

Mr. Kent, are you willing at this time to submit a sworn statement bearing on that particular subdivision?

47 Mr. Kent: I am not!

Mr. Johnson: Subdivision (c):

"Person, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and willfully of advancing that movement."

Mr. Rein: I'd just like to interject before Mr. Kent answers that. He is perfectly willing to state here why he wishes a passport and why he wishes to go abroad.

Mr. Johnson: The purpose of your recent application is—

Mr. Kent: To travel and work.

Mr. Johnson: So in summary then, you are not willing to submit a statement under oath or affirmation as to membership in the Communist Party or membership in the Communist front organizations?

Mr. Kent: No, I will not.

Mr. Johnson: Or organizations that—

Mr. Kent: I will not make such a statement under oath or out of oath!

Mr. Johnson: Mr. Kent, the Department of State
48 is willing at all times to give consideration to any information or any documentary information that you would like to submit in connection with your application for passport facilities. Pending the decision of the Department, you are at liberty to submit any information either you or your counsel wishes to submit.

Mr. Kent: The only—pardon me.

Mr. Rein: I don't know if the record is clear about the circumstances which led you to go to Moscow on your previous passport, the time of your previous trip.

Mr. Kent: If—oh, yes—

Mr. Rein: If the record isn't clear you might want to make a statement on that and perhaps you might want to make a statement as to the purposes of the passport now.

Mr. Kent: I'm very glad to make a statement.

Mr. Johnson: You may make any statement you wish, Mr. Kent.

Mr. Kent: It was referred to in, I think, my correspondence with Mrs. Shipley, my subsequent correspondence. I had no idea, in applying for my passport, of going anywhere but to France and to England originally and then it was extended to include the Scandinavian countries because I have lived there a good deal. I am familiar
49 with them and have friends there. In France I spoke before a large section of the Chamber of Deputies, urging that the French Government act against the employment of atomic weapons in warfare and toward total disarmament and the banishment of war.

Following that short address of mine, I was asked if I would accompany a delegation, an international delegation of members of various governments and others, to Moscow to lay the same proposal before the Supreme Soviet. For some reason or other, other Americans who had been expected didn't come and I immediately said, yes, I would be glad to. They said, "Give us your passport and we will get a visa." And that was done. And I went to Moscow and spoke, as of the record now, and there I was asked to accompany the delegates to Stockholm. So I got a visa. I went to the Swedish Consulate and I'm sure to the Finish Consulate. Anyhow, I got my visas to Finland and to Stockholm.

We had to stay over night at Helsinki. And in Stockholm I attended the Conference that drew up—not only attended the Conference that drew up the Stockholm Peace Appeal but was on the Board that drafted it. As I wrote Secretary Acheson, in my eagerness to go down there and explain just why, in my book of course I have shown the virtual identity of the Stockholm Appeal with the resolution passed by the Conference of Protestant Churches, or whatever it is called, and the Quakers and the Red Cross of Europe. But that is irrelevant, I guess. And then I came home.

And still innocent of having done anything, nobody asked for my passport when I came in, and then I wanted to go again because I had been elected a member of the International Jury to award peace prizes. They are prizes in a way comparable to the prizes awarded in Sweden—what are they called?

Mr. Nicholas: Nobel.

Mr. Kent: Nobel Prizes, yes. And I was invited to go there, all expenses paid, and in entire innocence I sent my passport, *my* passport, down to Mrs. Shipley and never got it back. Of course I used it, but I think probably $2.50 worth of it is still due me. That is the whole story.

Mr. Johnson: Did you use your passport on your trip to Moscow then, is that it?

Mr. Kent: Yes, oh, yes.

Mr. Nicholas: You obtained your Soviet visa in Paris?

Mr. Kent: Yes.

51 Mr. Johnson: That is your trip to Moscow in March of 1950?

Mr. Kent: Yes, and it was by way of Czechoslovakia. Whether or not I had a Czechoslovakian visa, I don't know, because it was only over night. We arrived in the evening and left early the next morning. So they may have dispensed with that. But anyhow you can check on that with the Passport Office.

Mr. Johnson: Just one concluding statement, Mr. Kent, have you any objection to the way in which this hearing was conducted here today?

Mr. Kent: Oh, no, not at all.

Mr. Johnson: How about you, Mr. Rein?

Mr. Kent: I felt there was no need—surely I wrote the book and everything is the truth in it, but it's completely irrelevant to this proceeding.

Mr. Rein: You mean so far as the manners? I think Mr. Kent has made it perfectly clear that he has no objections to the manners in this meeting. He does object to the procedure and to the basic premise behind it that you brought in those questions prerequisite to obtaining a passport. But I think that it should be perfectly clear.

Mr. Kent: If I may state my comment. It is not

52 a permission to travel. I am a grown up man; I am a citizen. I don't have to ask anybody's permission to travel. I don't concede that the Government has the right to permit me to travel or withhold permission to travel. It is a certification of my citizenship. It happens that a lot of countries require a passport. Some don't. Therefore, I may travel. The Government doesn't prevent my travel to Canada. I may travel there simply because they don't require a passport. But it is as though the State Department realized, ha, ha,—excuse me, I'm being flippant about it this way—we have the issuance of these in our power, and they are needed for that. Therefore,

we will keep them back and that does prohibit travel. It's very much as though a woman stole a man's pair of pants to keep him from going out of doors. She has no right of forbidding him to go out of doors but she can steal his pants and that does the trick. I want my pants back!

Mr. Nicholas: One point I would like to make, Mr. Kent. Mr. Johnson read you these subdivisions or subsections of 51.135 and one of them is (b). Now, there is another section, Section 51.141 (b) which modifies or explains or elaborates on Section 51.135(b). It says:

"Consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts
53 and changes of that line will suffice, prima facie, to support a finding under Section 51.135(b)."

Now, in arriving at a decision as to whether a person's case falls within Section 51.135(b), it is always pertinent for a person to submit evidence that he has done something on the other side, of things that were antagonistic to the Communist Party, that showed that he did something not along the line. Now, do you wish to submit any evidence of anything that you have done which has been opposite to the Communist Party line?

Mr. Kent: I think that I could very easily think of a number of things that I have done and principles I have advocated that they wouldn't like one single bit. I would have to think about them. Because I have not been concerned with whether I believed in what I believe in is believed by others, by the Communists or what. But, I'm not going to say that because, as I said before, I consider this irrelevant.

Mr. Rein: Let me indicate to you one point, Mr. Nicholas, without conceding the relevance of your question. I should say you have here a case which, if you want documentation of what Mr. Kent has done at any time, it is so clearly available in the public library or the Congressional Library, both in this book and other books,
54 that certainly Mr. Kent's position on everything, I don't think there is anything he has ever thought

or said that he hasn't spoken out as loud as anybody possibly can, and it doesn't require a great research job as to read this book or his previous books. If that is really the State Department's interest, we don't concede that. But I don't think Mr. Kent wants to concede that whether a position he has taken is consistent or inconsistent with the Communist Party line has any relevancy to this; he has a right to take any position he wants.

Mr. Nicholas: I want to call your attention to this and to the possibility of submitting evidence to countervail anything which may be in the Government's files to show that Mr. Kent has followed the line on various occasions. I mean, we want to give you the opportunity, Mr. Kent, to submit anything that you want which would show a deviation or opposition to the Communist Party line which would indicate that your case didn't fall within this section.

Mr. Kent: No, I don't think it's relevant. You see, this is largely a matter of principle with me, what I'm fighting for, if it has to be a fight. I wouldn't like it much better if it didn't have to be a fight. By fight, of course, I mean a court action. But my stand is that, since I am
55 an American citizen, I have never been in prison, never been convicted of a crime, though even that might not bar—I hadn't thought about it—even that might not bar a citizen from getting a passport, but because I am an American citizen I am entitled to a passport, stop.

Mr. Nicholas: Now, in connection with this same section, you referred in your book to the fact that your connection in various ways with, I think you said, 85 organizations—did you count them up?

Mr. Kent: Well, I don't know whether you know it or not, but the Attorney General's list is, with all due respect, rather silly because it includes the signing of petitions or an appeal or sponsoring of a banquet for somebody and all kinds of things like that. I don't know what they are. He says there are 85 organizations. All right, after all, what have they got the FBI for? I assume they

are efficient. In my last book I listed all I could think of and I have had some the FBI hadn't gotten. They are all listed, and in print.

Mr. Nicholas: The 85 was your count?

Mr. Kent: No, the 85 is the Attorney General's count.

Mr. Johnson: I think it's only fair to apprize Mr. Kent of the fact that we have additional information in our files which we are precluded by the Security Regulations from divulging at this hearing.

Mr. Rein: Which, I presume, you will take into consideration with addition to his book, is that it?

Mr. Johnson: That's it.

Mr. Rein: You don't think his book is enough for your purposes?

Mr. Johnson: Well, the matter of decision, of course, is not left to me.

Mr. Rein: Well, may I ask on behalf of Mr. Kent, what's the chances of getting an early decision? In other words, I do think—may I say this, I don't care whether it's on or off the record, you see.

[Off-the-record discussion]

[The interview was concluded at 3:40 p.m.]

Exhibit 10 to Hearing

State Department Information Program Information Centers

Wednesday, July 1, 1953

UNITED STATES SENATE,
SENATE PERMANENT SUBCOMMITTEE ON
INVESTIGATIONS OF THE COMMITTEE
ON GOVERNMENT OPERATIONS,
WASHINGTON, D. C.

The subcommittee met (pursuant to S. Res. 40 agreed to January 30, 1953) at 10:30 a. m., in room 318, Senate Office Building, Senator Joseph R. McCarthy (chairman of the subcommittee) presiding.

Present: Senators Joseph R. McCarthy and Stuart Symington.

Present also: Dr. J. B. Matthews, executive director, Permanent Investigations Subcommittee; Roy Cohn, chief counsel; David Schine, chief consultant; Mrs. Ruth Young Watt, chief clerk.

Senator McCarthy. The committee will come to order.

I may say one of the reasons for calling more authors whose works have been used in the libraries is to perhaps clarify some of the confusion in regard to what the objectives of the information program are, and also to give the American people a better picture of the type of authors whose works were being used to fight communism allegedly.

Mr. Counsel, which witness do you wish to call first?

Mr. Cohn: Mr. Rockwell Kent, Mr. Chairman.

STATEMENT OF ROCKWELL KENT, ACCOMPANIED BY DAVID REIN, WASHINGTON, D. C.

Senator McCarthy. Mr. Kent, you have been sworn. You are reminded that the oath continues in effect. Just for the record, you can consult with counsel any time you care to. You can stop your testimony if and when you like and talk to counsel. If you feel you want a private conference with him, we will try to give you a private room for that.

May I make the suggestion, however, that when you have your confidential conference that you do not do it into the mikes. We have had the experience several times of counsel conferring with his client, the Senators could not hear but quite a few people on radio or television could hear what they were saying.

May I ask counsel, has it been established that considerable of the works of Mr. Kent have been purchased by the old information authorities and used in our libraries?

Mr. Cohn. I think that there are several hundred copies.

Mr. Schine. That is correct, Mr. Chairman.

Senator McCarthy. Mr. Kent, may I ask you this question, first: Is it correct that at one time you contributed some $800 to the Communist Party?

Mr. Kent. That is correct. It was in the year 1933. May I tell again the circumstances?

Senator McCarthy. Yes. I may say you may answer any question at any length you care to.

Mr. Kent. Thank you.

Senator McCarthy. Any explanation that you care to make of any answer.

Mr. Kent. I would like to make the explanation. It was money received by the rental of my home against my orders. I tried to make the tenant take the money back and live in my home as a gift. In return for that generous gesture, I got a most insulting letter. I said to myself to whom can I give this money which I did not feel to be mine. Who will be the most hateful, the greatest possible enemy of such people. I went to New York and looked up under "C" in the telephone book, Communist Party; and I counted eenie-meenie-minie-mo, whether it was the Communist Party or Communist Labor Party, and it came out Communist Party, and I sent them the $800, and stated at the time that this was money to which I felt I was not entitled. It was not my money.

Dr. Matthews. Did you go to Communist Party headquarters and personally deliver the money?

Mr. Kent. I did not.

Senator McCarthy. I might say you could have found a better charity to give it to.

Mr. Kent. Nobody who would hate such people more.

Senator McCarthy. Have you contributed other amounts of money to organizations that have been officially listed by the Attorney General as fronts for doing work for the Communist Party?

Mr. Kent. I have contributed to many such organizations. I contribute to any organization that I feel is serving a good cause.

Senator McCarthy. Do you think that the organizations that are fronts for and doing the work for the Communist Party are serving a good cause?

Mr. Kent. The fact that they are listed by the Attorney General or by anyone else as subversive does not sway me to any degree. I am a man who makes up his own mind, and if I believe that they are serving a good cause and know what that cause is, then I will join them.

Senator McCarthy. Do you think that communism is serving a good cause?

Mr. Kent. I know very little about communism. I have come to a judgment about communism. I remember reading the Martin Dies book, listing what seemed to me practically every organization in America that was in my opinion doing good work, working for the Negroes, for freedom, for the poor, for good legislation. My conclusion on finishing that book was what would America be without these so-called Communist fronts. What would it be without the Communists.

Senator McCarthy. At the time you prepared the works which the old State Department purchased, were you then a member of the Communist Party?

Mr. Kent. In answer to that question, I am going to invoke the privilege of the fifth amendment, and if you please, refuse to answer.

Senator McCarthy. You understand you can only invoke the privilege, Mr. Kent, if you feel that a truthful answer to that question might tend to incriminate you.

Mr. Kent. The answer will only be truthful if I make it. I feel that an answer might be a link in a chain of evidence that might be incriminating.

Senator McCarthy. Are you a member of the Communist Party as of today?

Mr. Kent. Should I go through this rigamarole every time? I avail myself of the fifth amendment. Is that all right?

Senator McCarthy. That is sufficient. In other words, when you say you avail yourself of the fifth amendment, we understand you to say that if you were to give a truthful answer, that answer might tend to incriminate you, and therefore you refuse to answer.

Mr. Kent. Yes, sir.

Senator McCarthy. I have no further questions.

I think that is all, Mr. Ker'. Thank you very much.

Mr. Kent. I am really going to ask the indulgence of the committee.

Senator McCarthy. Mr. Kent, may I say this, that you certainly are a very pleasant individual. Looking at you, you certainly would not be taken by the average person to be a member of the Communist Party. When you tell us that if you were to truthfully tell us whether you are a member of the Communist Party, that is the strongest indication we can get that you are a member of the Communist Party. So no matter how pleasant you may seem, I must refuse to hear any speech or any lecture from you. If you were to tell us that you were a member of the party and tell us when you joined, and why you were a member, I would not object to hearing from you. I have no objection to hearing from any member of the party who has the guts to stand up and say, "I am a Communist," and then let him preach his doctrine if he wishes. I am a strong believer, however, that where you have poison, it should be labeled poison. Where it is not poison, it should be properly labeled. So we will not hear any lecture from you unless you care to tell us whether you are a member of the party.

Mr. Kent. Lecture is the wrong word. The indulgence that I ask is that only the night before last I received the summons, and I live 300 miles north of New York, and 25 miles from the railroad station, and I got here. I am really here of my own free will, because I wanted to come before the committee and tell them what I believe. There is no signature to this. It is no more good to me than a check without a signature.

Mr. Cohn. The original, of course, was signed, Mr. Chairman. The original which was in the hands of the marshal when service was made bore the signature of the chairman. Furthermore, Mr. Kent had actual notice that he was wanted by the committee. I read a statement he made to the press in the newspapers over the weekend.

Mr. Kent. I knew I was to be called.

Senator McCarthy. May I ask one further question, Mr. Kent? Over the weekend after the papers carried the story that you were to appear here, you made a statement which was not under oath. You said it was ridiculous for anyone to assume—I am not quoting from memory—or claim you are a member of the Communist Party. I believe your statement was to the effect that you were not a member of the party.

Mr. Kent. When was this?

Senator McCarthy. Is that a correct quotation?

Mr. Kent. When?

Senator McCarthy. Let me ask you this: Did you tell the press after the notice of your subpena that you were not a member of the party?

Mr. Kent. No. The press notice that I saw in the Times, I think, the Syracuse Times-Union, was correct. I said nothing whatever. There was no question asked me, and I made no remark whether I was or was not a member of the Communist Party. I did say that I consider these book burnings as exactly paralled to the book burning in Hitler Germany, and came to the same judgment about those who are responsible for it, that the American people came to in regard to those responsible for the book burnings in Germany.

Senator McCarthy. If you did not make that statement, I beg your pardon. I understood you stated to the press you are not a member of the party. Would you think it would be improper to burn obscene filthy books that are on newsstands on the corner available to your children or your neighbor's children?

Mr. Kent. May I on the authority of a writer and painter—

Senator McCarthy. Will you try and answer that? You are talking about book burnings. I assume by book burnings you mean the removal of books from the stand; and getting rid of books. Let us forget about the Communist writers for the time being.

Mr. Kent. Yes.

Senator McCarthy. If you find filthy, obscene books on the corner newsstand—I do not know whether you have children or not, but I assume you have—and they are available to your children, would you advocate that those be removed and not be made available to youngsters?

Mr. Kent. All art is to be a crystallization and embodiment of the human beings, and they must be thought of as human beings. I would prosecute books for filthiness, lewdness—

Senator McCarthy. I did not get the first part of your sentence.

Mr. Kent. My books are the best of myself that I can put into the book. It is me. It is a living thing. I believe that all books should be looked upon as living things and treated as human beings. If they are obscene, if they advocate murder, if they advocate any violation of the law, if they advocate treason, they should be dealt with, tried, and punished, and confiscated.

Senator McCarthy. You cannot try and punish a book. Let us say that a book does advocate the things you mentioned. Let us assume it is obscene. Let us assume it advocates the violation of our laws. Would you say that book should be removed from the corner newsstand?

Mr. Kent. If found guilty by due trial.

Senator McCarthy. How can you try a book?

Mr. Kent. You can try a book. This is a committee that is virtually trying me. It amounts to that, does it not?

Senator McCarthy. We have not mistreated you, have we? We merely asked you whether you are a member of the Communist Party.

Mr. Kent. And by not answering the question, though I don't answer it to protect guilt or innocence, I feel my answer—that provision in the fifth amendment to be for the protection of the innocent as well as to shield the guilty.

Senator McCarthy. You are wrong, Mr. Kent. The provisions of the fifth amendment is to avoid forcing a man to convict himself. You perhaps know the origin of that. You are a writer.

Mr. Kent. I mentioned the origin of it in the preliminary dealing. I believe the origins was in the puritan days when they wanted to tell what they believed and could not because they would be prosecuted.

Senator McCarthy. You are wrong. The origin goes farther than that. The origin comes from old English law and practice. At the time when a criminal could go into a church, and as long as he hung on the rail, he could not be apprehended, and from that stemmed the English law which we have copied to the effect that a guilty man never need convict himself. If you were not a member of the Communist Party, then you could very simply say, "No; I am not a member." That would in no way incriminate you. So when you tell this committee, "If I were to tell the truth and tell you whether I am or am not a Communist, the truth might incriminate me," that is the same as telling this committee and the world that you are a member of the party. That cannot be used against you in a criminal case, of course. It could not even be presented to a jury, the fact that you refused to testify here. But you are here before a committee, you are under oath, you have the opportunity today if you are not a Communist to very simply say, "No; I am not a Communist." We are giving you that opportunity. You may avail yourself of it if you are not a Communist. If you are a Communist, then, of course, you should refuse to answer. Otherwise you might be prosecuted for perjury.

Mr. Kent. Senator, what you have said I understand. As I said, this committee renders a verdict of guilty for those who invoke an amendment that I believe exists—a privilege that I believe exists for the innocent as well as for the guilty.

Senator McCarthy. I thank you, Mr. Kent.

Mr. Kent. Senator, I would like to leave this statement with you.

Senator McCarthy. You certainly may.

Mr. Kent. I would like to read it, but you said you don't want a lecture. I get paid for lectures.

Senator McCarthy. I want to say if you will answer the question as to whether or not you are a Communist as of this moment, if you will say, "Yes, I am," or if you will say, "No, I am not," we will hear from you. I do not have any objection to hearing from a man who says, "I am a Communist." I am not worried about that man perverting the minds of the American people. But when you refuse to answer, I frankly will hear no more from you.

Mr. Kent. I am sorry, because I had serious charges to bring here of a conspiracy to overthrow the American Government by force and violence.

Senator McCarthy. You may step down unless you answer the question.

Mr. Kent. Thank you.

Mr. Cohn. Mr. Richard O. Boyer.

Exhibit "30"

54 In reply refer to
F130—Kent, Rockwell

Nov. 25, 1955

Dear Mr. Kent:

Reference is made to your application for a passport, concerning which an informal hearing was held at the Passport Office on November 8, 1955.

Section 51.142 of the Passport Regulations of the Department of State provides that a passport applicant may be required, as a part of his application, to subscribe under oath or affirmation to a statement with respect to present or past membership in the Communist Party.

At the informal hearing, at which you were represented by counsel, you declined to furnish a statement, subscribed and sworn to under oath or affirmation with respect to your present or past membership in the Communist Party, insisting that such a statement was irrelevant. Moreover, you refused to discuss or furnish any information concerning your alleged affiliation with Communist front organizations or other alleged Communist activities on the same ground. These allegations, which you have neither refuted nor explained, were detailed in my letter to you of June 29, 1955.

The Department will be glad to give further consideration to your passport application at such time as you are willing to comply with the Passport Regulations.

Sincerely yours,

FRANCES G. KNIGHT
Director, Passport Office

MR. ROCKWELL KENT,
Au Sable Forks,
New York.

Exhibit "31"

55 November 30, 1955.

John W. Sipes, Esq., Counsel,
Board of Passport Appeals,
Department of State,
Washington, D. C.

Dear Mr. Sipes:

I enclose a letter received today from the Passport Office declining the rendering of a decision in the case of Mr. Rockwell Kent.

I assume from our past correspondence in the cases of Dr. Otto Nathan and Dr. Clark Foreman and Dr. Walter Briehl that the Board of Passport Appeals will not entertain an appeal from Miss Knight's decision. In this connection I refer you specifically to your letter of September 29th, 1955 with respect to Dr. Walter Briehl.

In view of the long pendency of the proceedings in the Department with respect to Mr. Rockwell Kent and what appears to be the established policy of the Department, I shall appreciate your advising me whether I am correct in my understanding that the Board will not entertain an appeal in the case of Mr. Rockwell Kent.

Should I be in error on this point, I propose to file an appeal immediately with the Board.

In reviewing my correspondence in Dr. Briehl's case I note that three letters from me were sent before I received your response of September 29th. In view of the long pendency of Mr. Kent's case, may I request your reply by return mail, special delivery.

Sincerely yours,

LEONARD B. BOUDIN

LBB:H
Encl.

Exhibit "32"

56 December 5, 1955

Hon. John Foster Dulles
Secretary of State
Washington, D. C.

Re: Rockwell Kent

Dear Sir:

On November 30, I wrote to Mr. John W. Sipes, Counsel to the Board of Passport Appeals, as per copy enclosed. Although the need for and the possibility of a prompt response is clear from my letter, no such response has been received to date. May I therefore respectfully request that you have the proper person advise me immediately as to the answer to my inquiry?

Very truly yours,

LEONARD B. BOUDIN

LBB:J
enc.

Exhibit "33"

57 Filed Feb. 7, 1956

December 7, 1955.

Chairman,
Board of Passport Appeal,
Department of State,
Washington, D. C.

In re Rockwell Kent

Dear Sir:

I shall appreciate your response to my several requests to Mr. Sipes with respect to the appealability of the Passport Office's decision in the above matter.

May I have your reply by return mail.

Very truly yours,

LEONARD B. BOUDIN

LBB:H

61 Filed Feb. 23, 1956

Defendant's Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment

Comes now the defendant by his attorney, the United States Attorney, and moves this Honorable Court for judgment on the pleadings or in the alternative for summary judgment on the ground that there is no genuine issue of material fact and defendant is entitled to judgment as a matter of law. Attached hereto and made a part hereof as Exhibit "A" is the affidavit of Frances G. Knight, Director of the Passport Office.

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62 Filed Feb. 23, 1956

Affidavit of Frances G. Knight

I, Frances G. Knight, being duly sworn, depose and say that:

(1) I am the Director of the Passport Office of the Department of State and am charged by the Secretary of State with responsibility for determining the action to be taken in the first instance on all passport applications.

(2) On June 1, 1955, the plaintiff filed a passport application stating therein, and in letters to the Passport Office (see Plaintiff's Exhibits 10 and 11), that he desired to visit England and to attend a meeting of the World Counsel of Peace to be held in Helsinki, Finland.

(3) On June 29, 1955, I notified the plaintiff in writing (see Plaintiff's Exhibit 12) that it appeared the issuance of a passport to him for travel abroad was precluded because the evidence in my possession indicated he comes within each of the categories of persons to whom passport facilities are to be refused under Section 51.135 of the Passport Regulations (22 C.F.R. 51.135), which provides:

"51.135 *Limitation on Issuance of Passports to Persons Supporting Communist Movement.* In order to promote

the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

63 "(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party;

"(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement.

"(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and willfully of advancing that movement."

He was also advised that he could present his case and all relevant information, either personally or in writing, to the Passport Office in accordance with Section 51.137 of the Passport Regulations, and that in either event it would be necessary for him to submit an affidavit concerning membership in the Communist Party, as provided by Section 51.142 of the Passport Regulations. A copy of the Passport Regulations is attached as Exhibit A.

(4) Thereafter, on August 2, 1955, plaintiff filed a new application for a passport wherein he stated that he de-

sires to visit England, Ireland, France, Switzerland, Denmark, Norway, Sweden, Finland, Italy and Czechoslovakia for business and pleasure.

(5) On September 29, 1955, I informed plaintiff's attorney by letter (see Plaintiff's Exhibit 20) that the informal hearing procedure specified in Regulations Section 51.137 was still open to him if he desired to explain away or deny any of the matters noted in my letter of June 29, 1955, tentatively refusing passport facilities to plaintiff.

(6) On October 27, 1955, the plaintiff's attorney advised me by letter that plaintiff "has taken the posi-
64 tion that the Passport Office's demand for an affidavit under Section 51.142 of the regulations is unlawful and that for that reason and as a matter of conscience, he will not respond to such a demand." (See Plaintiff's Exhibit 23.)

(7) On November 8, 1955, plaintiff, with counsel, appeared for an informal hearing in the Passport Office, during which plaintiff again was asked to submit an affidavit in accordance with Section 51.142, but he refused. Plaintiff also refused: "to consider the allegations" in my letter of June 29, 1955; "to submit a sworn statement" as to whether or not he is under the direction, domination, or control of the Communist movement"; and he refused to submit any evidence to show that he has done anything in opposition to the Communist Party line. Passport Office Transcript of Proceedings, In the Matter of Rockwell Kent, November 8, 1955, pp. 29, 46-47, 50, 53 (see Plaintiff's Exhibit 24).

(8) Accordingly, on November 25, 1955, I informed plaintiff by letter (see Plaintiff's Exhibit 30) that there would be no further proceedings with respect to his application until he fully complied with the Passport Regulations.

(9) On December 14, 1955, plaintiff still not having complied with the Passport Regulations filed suit to compell the issuance of a passport and for other relief.

(10) To date plaintiff has not submitted the required affidavit nor explained away any of the matters set forth in my letter to him, June 29, 1955.

(11) I deem it necessary to require the plaintiff to execute, as a part of his application, an oath or affirmation as to present the past membership in the Communist Party because of information set forth in (a) government publications, news reports and other public sources; (b) records of the Department of State and confidential
65 reports from its officers in foreign countries; and (c) confidential reports from another agency of the Government; which information compelled me to conclude that the plaintiff has manifested a consistent and prolonged adherence to the Communist Party line on a variety of issues through shifts and changes of that line.

(12) The information obtained from public sources shows:

(a) That during the past 20 years plaintiff, who admits that until then he "was not a joiner", has been a consistent supporter of Communist organizations—at least 85, according to Congressional Committee reports—as evidenced by his support, for example, of the following 23 organizations, all cited by the Attorney General as "Communist" pursuant to Executive Order 9835: president of the International Workers Order; national committeeman of the American League for Peace and Democracy; national committeeman of the North American Committee To Aid Spanish Democracy; national committeeman of the International Labor Defense; sponsor of the United American Spanish Aid Committee; sponsor of the Schappes Defense Committee; sponsor of the American Committee for Protection of Foreign Born; sponsor of the

National Federation for Constitutional Liberties; master of ceremonies for a 1940 meeting of the American Peace Mobilization; participated in the efforts of the Abraham Lincoln School (Chicago, Illinois); sponsor of the tenth annual convention of the National Negro Congress; affiliation with the League of American Writers and the National Committee for the Defense of Political Prisoners; sponsor of the American Committee for Spanish Freedom; sponsor of Council for Pan-American Democracy; sponsor of Council for a Democratic Far Eastern Policy; sponsor of National Council of American Soviet Friendship; sponsor of American Committee for Yugoslav Relief, Inc.; sponsor of a 1947 Banquet of the American Slav
66 Congress; affiliated with the Joint-Anti-Fascist Refugee Committee and the Friends of the Soviet Union; aided and urged participation in the Civil Rights Congress; and a charter member of the Peoples' Radio Foundation, Inc.

(b) That in 1951 plaintiff was an initial sponsor of; and has since urged others to participate in; the American Peace Crusade, an organization designated by the Attorney General pursuant to Executive Order 10450 after it had failed to take advantage of the hearing procedures.

(c) That plaintiff has otherwise demonstrated his affinity for Communist organizations in that he was national chairman of the National Committee for People's Rights, described in 1940 as "an auxiliary of the Communist Party" by a former member of the Central Executive Board, Communist Party of Kansas when he testified before a congressional committee; that plaintiff was a sponsor of, and otherwise active on behalf of, the Scientific and Cultural Conference for World Peace, held in New York City in March 1949, which organization the then Secretary of State described as a "sounding board for Communist propaganda"; and that, as more fully detailed in my letter of June 29, 1955, plaintiff has been

affiliated with numerous other organizations described as Communist-fronts by one or more legislative committees.

(d) That plaintiff's activities have induced others to conclude as follows: Benjamin Gitlow, a former vice presidential candidate on the Communist Party ticket, told a congressional committee in 1939 that plaintiff 67 was one of the national committee board members of the International Labor Defense "who are Communists"; Maurice Malkin, a former Communist Party member, also told a congressional committee in 1939 that, if plaintiff is not a Communist Party member, he is "very close to them"; Dr. Goodwin Watson while testifying before a congressional committee in 1943, concerning his knowledge about Communist activities, said: "I think he [plaintiff] is pretty well lined up with the Communists"; plaintiff was "one of the so-called leaders of the Communist Party", according to testimony of special investigator for the Dies Committee, 1940-41; Directors of Carnegie Library refused to permit American League for Peace and Democracy to use its facilities for special meeting to honor plaintiff in 1939 because they believed plaintiff to be a Communist; plaintiff spoke at American Labor Party meeting in 1948, all the work for which meeting was done by Communists, a former Communist Party member told a congressional committee in 1953; and in 1949 Dr. Matthews, the then Director of Research for the House Committee on Un-American Activities, referred to plaintiff as a Communist Party member.

(e) That plaintiff has been active in programs supporting nationally known individual Communist Party members, as evidence by plaintiff being national chairman of the Professional Groups for Browder and Ford in 1936; sponsor of Mother Bloor Birthday Banquets, particularly those in 1936, 1937 and 1947; signer of an open letter in 1942 on behalf of Harry Bridges; signer of open letter in 1940 calling for release of Sam D'Arcy, then chairman of

Communist Party in Pennsylvania; signer of a 1947 statement on behalf of Gerhardt Eisler; publicly supporting Communist Party congressional candidate Leo Isacson; activity on behalf of Eugene Dennis and George Dimitrov; a signer of an open letter supporting the Hollywood writers who refused to answer questions before a congressional committee about their associations with the Communist Party; and the other similar activities
68 noted in my letter of June 29, 1955.

(f) That plaintiff, when in 1953 he was called to testify before the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, refused to answer questions, solely on the ground that the answers would tend to incriminate him, about whether or not he was a Communist Party member.

(g) That plaintiff by his statements, both oral and written, has demonstrated that he accepts Communist Party propaganda, as for example, plaintiff's 1936 article in the "New Masses" (June 23, 1936 issue) which concluded that

"to be a true American a man must have the will to right our social wrongs. How is his concern. For me the way is Communism."

and his speech of March 7, 1950, before the Soviet Committee in Defense of Peace wherein, he said, *inter alia* that

"As a member of this peace delegation and a fighter for peace, I must tell you that I am not an official representative of the American Government. I must also say, in respect to my own integrity, that the American Government is not representative of me."

and at a press conference in Moscow the following day, plaintiff stated that anti-Soviet slander is fostered by the United States Government so as to instill in the Ameri-

can people hostile feelings toward Soviet people, and, further, that he told reporters on August 18, 1950, at his home that:

"I am interested in the peace movement because it is backed by Communists. Anything that the Communists say about peace sounds good to me."

(h) That in March 1950, plaintiff went to Moscow as a member of a "peace" delegation even though his passport was not valid for travel there and that plaintiff presumably was aware that passports were not being validated for that particular trip because the "peace" delegation announced a unanimous resolution protesting what it said was this Government's ban on the "peace" delegation's trip abroad.

(i) And that plaintiff has otherwise been active
69 in Communist sponsored programs and events, as indicated in my letter to him, June 29, 1955.

(13) The Department's records and reports from its diplomatic and consular officers abroad, show, *inter alia*:

(a) That plaintiff was a member of the "National Committee to Defend Dr. W.E.B. Dubois and Associates in the Peace Information Center" under whose auspices a message was despatched in 1951 to the World Federation of Trade Unions, where in it was stated that "today everyone appearing before an American Court of Law as a political prisoner has to accept a sentence."

(b) That during a March 1950 speech in Sweden plaintiff again stated that the United States Government did not represent him or his views; that the American people were confused by the propaganda put forth by the American press and radio; and that this is all attributable to the "revolver men" in power in Washington.

(c) That during a March 1950 press interview in Denmark plaintiff said that the United States looks with dis-

favor upon peace partisans like himself because the United States manufactures arms to hold back depression and, therefore, dislikes talk about peace.

(d) That in 1948 plaintiff was invited by the Communist Women's International Democratic Federation to be a member of the International Committee of Honor to preside over the organization's exposition in Paris, 1948.

(e) That while plaintiff was in Helsinki, Finland, March 1950, he visited the Soviet Embassy there but not the Embassy of the United States.

(14) Confidential reports from another agency of the Government show *inter alia*, that plaintiff often attended special Communist Party meetings in Chicago, Illinois.

70 In view of the aforenoted information, I still deem it necessary for plaintiff to execute the requested affidavit before I can further process his application for a passport.

FRANCES KNIGHT
Frances G. Knight

Opinion of the Court

The Court: (McGarraghy, J.) I am prepared to rule, to express my view on the case. In my opinion the passport regulations in question are valid and reasonable regulations.

Further, in my opinion the plaintiff is not entitled to relief because he fails first to show he has exhausted his administrative remedies, and, second, because he fails to qualify for a passport in that he has failed to make the non-Communist affidavit which the valid regulations require, and therefore I will deny the motion for a preliminary injunction and will deny the plaintiff's motion for summary judgment and grant the Government's motion for summary judgment.

74 Filed Mar. 29, 1956

Order

Upon consideration of plaintiff's motions for preliminary injunction and for summary judgment, and of defendant's cross-motion for summary judgment, and it appearing to the Court that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law, it is by the Court this 29th day of March, 1956,

ORDERED, That the defendant's cross-motion for summary judgment be and the same hereby is granted, and it is

FURTHER ORDERED, That the plaintiff's motion for summary judgment be and the same hereby is denied, and it is

FURTHER ORDERED, That the plaintiff's motion for preliminary injunction be and the same hereby is denied, and it is

FURTHER ORDERED, That the complaint herein be and the same hereby is dismissed.

JOSEPH C. McGARRAGHY
Judge

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75 Filed Mar. 30, 1956

Notice of Appeal

Notice is hereby given this 30th day of March, 1956, that the plaintiff, Rockwell Kent, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 29th day of March, 1956, in favor of the defendant, John Foster Dulles, against said plaintiff.

[fol. 87] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13297

ROCKWELL KENT, Appellant,

v.

JOHN FOSTER DULLES, Secretary of State, Appellee.

Appeal from the United States District Court for the District of Columbia.

OPINION—Decided June 27, 1957

Mr. Leonard B. Boudin, with whom *Messrs. David Rein* and *Joseph Forer* were on the brief, for appellant.

Mr. B. Jenkins Middleton, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Mr. Oliver Gasch*, United States Attorney, and *Mr. Paul A. Sweeney*, Attorney, Department of Justice, were on the brief, for appellee. *Mr. Lewis Carroll*, Assistant United States Attorney, also entered an appearance for appellee.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER and BASTIAN, Circuit Judges, sitting *en banc*.

PRETTYMAN, *Circuit Judge*: Rockwell Kent is an artist. On August 2, 1955, he filed with the Department of State an application for a passport to travel to Europe to paint pictures. He stated he desired to visit England, Ireland, [fol. 88] France, Switzerland, Denmark, Norway, Sweden, Finland, Italy and Czechoslovakia, the stated purpose being "prosecution of profession and pleasure". The Director of the Passport Office wrote him under date of September 29, 1955, referring to the action of the Department upon a prior application. Upon receipt of that prior

application, executed June 1, 1955, the Department had written him that it was obliged to disapprove the request tentatively, on the ground that the grant was precluded under Section 51.135 of the Department's Passport Regulations:[1] The letter of the Department continued, "In your case it has been alleged that you were a Communist." Thereafter the letter contained a long (four printed pages in the joint appendix before us) recital of affiliations with Communist-front organizations, espousals of the Communist cause, and participation in Communist activities. He was advised that he would be required, as a prerequisite to a hearing on his application, to submit a sworn statement as to whether he was then or ever had been a Communist.

On October 27, 1955, counsel for Mr. Kent wrote the Department that his client had taken the position that the demand for an affidavit was unlawful and that he would not respond to such demand. However, on November 8, 1955, an informal hearing was held in the Passport Office, at which hearing Mr. Kent appeared with counsel. In the course of the hearing the Department put certain evidence in the record, principally a copy of Mr. Kent's book, *It's Me O Lord*, an autobiography. Mr. Kent conceded that anything in the book is accurate. Portions of the book were read into the record. In the course of that hearing Mr. Kent was asked a question directed at each subdivision of Section 51.135 of the Passport Regulations. He was asked whether he would submit a sworn statement [fol. 89] as to whether he was or was not a member of the Communist Party, a sworn statement bearing on subsection (b) of the regulation, or a sworn statement as to membership in Communist-front organizations. He refused to submit any such sworn statement. He summarized his position thus: "* * * because I am an American citizen I am entitled to a passport, stop."

On November 25, 1955, the Director of the Passport Office wrote Mr. Kent, referring to his declining to furnish a statement respecting his then-present or past membership in the Communist Party, his alleged affiliation with

[1] 17 FED. REG. 8013 (1952), 22 C.F.R. §51.135 (Supp. 1955).

Communist-front organizations, and other alleged Communist activities. The letter concluded:

> "The Department will be glad to give further consideration to your passport application at such time as you are willing to comply with the Passport Regulations."

Mr. Kent thereupon filed in the District Court a complaint for declaratory judgment and injunction. The Secretary answered. The plaintiff then moved for preliminary injunction and for summary judgment, and the Secretary moved for judgment on the pleadings or for summary judgment. In a brief opinion the District Court held that the passport regulations are valid and reasonable. It denied the plaintiff's motions and granted the Secretary's motion for summary judgment. This appeal followed.

It is stated to us by both the appellant and the appellee that the issues in this case are identical with the issues in *Briehl* v. *Dulles*,[2] decided by this court today. The members of the court vote in this case as they voted in that one and adhere to the opinions filed by them in that case. Accordingly Judges Prettyman, Wilbur K. Miller, Washington, Danaher and Bastian vote to affirm. Chief Judge Edgerton and Judge Bazelon vote to reverse. Judge Fahy [fol. 90] votes to reverse and to remand for further proceedings before the Secretary consistently with the views set forth in his opinion in *Briehl*.

Affirmed.

BURGER, *Circuit Judge*, took no part in the consideration or decision of this case.

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[2] —— U.S. App. D.C. ——, —— F.2d ——.

[fol. 91] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957

C.A. 5411-55

No. 13,297

ROCKWELL KENT, Appellant,

v.

JOHN FOSTER DULLES, Secretary of State, Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher and Bastian, Circuit Judges, sitting en banc.

JUDGMENT—June 27, 1957

This cause came on to be reheard en banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: June 27, 1957.

Per Circuit Judge Prettyman.

Circuit Judges Prettyman, Wilbur K. Miller, Washington, Danaher and Bastian vote to affirm.

Chief Judge Edgerton and Circuit Judge Bazelon vote to reverse.

Judge Fahy votes to reverse and to remand for further proceedings before the Secretary of State consistently with the views set forth in his opinion in No. 13,317, *Briehl* v. *Dulles*.

Circuit Judge Burger took no part in the consideration or decision of this case.

[fol. 95] Clerk's Certificate to foregoing transcript omitted in printing.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,317

WALTER BRIEHL, *Appellant*,

v.

JOHN FOSTER DULLES, Secretary of State, *Appellee*.

Appeal from the United States District Court for the District of Columbia

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JOINT APPENDIX

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9 Filed Nov. 16, 1955

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5042-'55

DR. WALTER BRIEHL, 2060 North Vine Street, Los Angeles, California, *Plaintiff*,

v.

JOHN FOSTER DULLES, Secretary of State, Department of State, Washington, D. C.; *Defendant*.

Complaint for Declaratory Judgment and Injunction

The plaintiff, Walter Briehl by his attorneys, complaining of the defendant, John Foster Dulles, Secretary of State, alleges as follows:

1. The Court has jurisdiction of this action under D. C. Code Sections 11-305 and 11-306; under Section 10 of the Administrative Procedure Act, Title 5 U. S. Code section 1009; and under Title 28 U. S. Code, section 2201.

2. The defendant, John Foster Dulles, is Secretary of State of the United States, and is charged by law with the duty of issuing passports in the United States.

3. The plaintiff is a citizen of the United States, residing in Los Angeles, California. He is a practicing psychiatrist and a member of various national and international psychiatric and pyschoanalytic societies.

4. In connection with his profession, plaintiff finds it necessary to attend international meetings dealing with the subject matter of his profession.

5. In May 1953 the plaintiff applied for and obtained a passport for the purpose of attending international conferences, and used this passport in order to attend
10 an International Pyschoanalytic meeting in London and a meeting of the World Federation of Health

at Vienna. Upon his return from these meetings he reported on these proceedings to his local societies in Los Angeles.

6. Plaintiff at all times used the said passport in accordance with the laws, regulations and orders relating thereto, and in compliance with the terms and conditions set forth in the said passport.

7. Upon the expiration of this passport, the appellant in April 1955 applied for a renewal of the passport. He stated in his application for renewal that he wished this passport for the purpose of attending international conferences abroad, specifically, an international psychoanalytic congress in Geneva and a World Mental Health Organization Congress in Istanbul. These were the same congresses which plaintiff has previously attended and had reported back to his local societies in Los Angeles.

8. Subsequently on May 31, 1955 the defendant acting through his subordinate, the Director of the Passport Office, wrote to the plaintiff stating that his application for renewal of a passport was tentatively rejected under the provisions of Section 51.135 of Title 22 of the Code of Federal regulations. The letter stated that this denial of the application was based upon allegations in the files of the State Department that the plaintiff had been a member of the Communist Party and had allegedly had associations with alleged Communist organizations.

9. The plaintiff replied asking for an evidentiary hearing in which he might be confronted with the evidence, if any, upon which the decision of the State Department had been based. Subsequently, the plaintiff appeared at the Passport Office for a hearing. At this hearing, the plaintiff demanded that he be confronted with the evidence upon which the State Department based its action. The State Department refused to comply with this request maintaining that the sole purpose of the hearing was to give officials of the State Department an opportunity to

11 question the plaintiff concerning his lawful political beliefs and associations. The plaintiff, nevertheless, insisted upon his right to be confronted with the evidence against him and refused to submit himself to such an inquisition.

10. Thereafter on September 16, 1955 the Director of the Passport Office informed the plaintiff that she would take no action on his application for renewal because of the plaintiff's refusal to submit himself to an inquisition into his political beliefs and associations in the absence of being confronted with the evidence, if any, upon which the State Department relied.

11. Plaintiff duly filed an appeal with the Board of Passport Appeals. The plaintiff was advised that since the Passport Office had not formally denied the plaintiff a passport but had merely stated that it would refuse to act on his application, under the appropriate regulations, no appeal would be taken to the Board of Passport Appeals.

12. The action of the defendant in this case is unlawful in that:

a. Plaintiff as an American citizen has a right under the First, Fifth, Ninth and Tenth Amendments to travel outside of the United States.

b. The statutes authorizing the Secretary of State to issue passports do not authorize him to impose political conditions upon the issuance of passports. The regulations issued by the Secretary of State are not authorized by statute and are on their face arbitrary and illegal in that they impose political conditions upon travel in violation of applicable statutes and the First and Fifth Amendments of the Constitution.

c. Due process of law requires that before an individual be denied the right of travel he must be accorded a hearing at which he will have the opportunity to be confronted with the evidence against him.

12 d. There is no authority in the statute authorizing the issuance of passports for the imposition of a test oath as a condition precedent to consideration of an application for a passport; and the imposition of such a condition is in violation of the First and Fifth Amendments.

13. The plaintiff has exhausted his administrative remedies.

14. The actions of the defendant in denying the plaintiff a renewal of his passport and refusing to consider his application for renewal have interfered with plaintiff's rights of travel, free speech, association and livelihood and are causing the plaintiff irreparable injury for which he has no adequate remedy at law.

WHEREFORE, plaintiff prays for a judgment

a. Decreeing that the plaintiff, as an American citizen, is entitled to a passport under the statutes of the United States, including the Passport Act of 1926.

b. Decreeing that the passport regulations of the Secretary of State are invalid and illegal and are in violation of the statutes of the United States, including the Passport Act of 1926, the Constitution of the United States and the Universal Declaration of Human Rights of the United Nations.

c. Decreeing that the defendant's refusal to renew the plaintiff's passport are in violation of the plaintiff's rights under the Passport Act of 1926, the Constitution of the United States and the Declaration of Human Rights of the United Nations.

d. Enjoining the defendant from continuing to deny a passport to the plaintiff.

e. Directing the defendant to renew plaintiff's passport.

f. And for such other and further relief as may be just and proper.

14 Filed Jan. 17, 1956

Answer

FIRST DEFENSE

The complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of the complaint.

THIRD DEFENSE

Plaintiff has failed to comply with the passport regulations and consequently is ineligible for a passport.

FOURTH DEFENSE

Plaintiff has failed to exhaust his administrative remedies.

FIFTH DEFENSE

Answering specifically the allegations contained in the numbered paragraphs of the complaint, defendant avers:

1. Defendant asserts that inasmuch as the allegations contained in the first paragraph of the complaint state conclusions of law, he is not required to plead responsively thereto, but were he required to reply he would deny the conclusions alleged therein.

2. Defendant denies the allegations contained in the second paragraph of the complaint except that defendant admits that he is Secretary of State of the United States and that as Secretary of State, he alone is authorized to grant and issue, or refuse to grant and issue passports, under such rules as the President designates.

15 3. Defendant admits that plaintiff is a citizen of the United States residing in Los Angeles, Cali-

fornia. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 3 of the complaint.

4. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the complaint.

5. Defendant admits that in May, 1953 the plaintiff applied for and obtained a passport. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 5 of the complaint.

6. Defendant is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 6 of the complaint.

7. The allegations contained in paragraph 7 of the complaint are admitted except that defendant avers he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last sentence of paragraph 7 of the complaint.

8. In answer to the allegations contained in paragraph 8 of the complaint, defendant avers that on May 13, 1955 plaintiff was asked to furnish the Department of State with an affidavit as to whether he had ever been or was a member of the Communist Party. Thereafter, on May 20, 1955, plaintiff responded to the Department of State's request and refused to furnish said affidavit. Thereafter on May 31, the defendant, acting through his subordinate, the Director of the Passport office, wrote to the plaintiff stating that his application for renewal of the passport was tentatively rejected under the provisions of Section 51.135 of Title 22 of the Code of Federal Regulations. The letter stated that the denial of the application for a passport was based upon the following allegations: "Specifically, it is alleged that you were a member of the Los Angeles County Communist Party; that you were a mem-

ber of the Book Shop Association, St. Louis, Missouri; that you held Communist Party meetings; that in 1936 and 1951 you contributed articles to the Communist publication "Social Work Today"; that in 1939, 1940, and 1941 you were a sponsor to raise funds for veterans of the Abraham Lincoln Brigade and calling on the President of the United States by a petition to defend the rights of the Communist Party and its members; that you contributed to the Civil Rights Congress Bail Fund, to be used in raising bail on behalf of convicted Communist leaders in New York City; that you were a member of the Hollywood Arts, Sciences and Professions Council and a contact of the Los Angeles Committee for Protection of Foreign Born and a contact of the Freedom Stage, Inc."

9. Denied. Further answering, defendant avers that the plaintiff was thereafter given an informal hearing before the Passport Office of the Department of State, at which time the plaintiff refused to file an affidavit and refused to give any testimony whatsoever relating to the allegations against him contained hereinabove.

10. Denied. Further answering, defendant avers that the Director of the Passport Office stated there was no further action which could be appropriately taken by the Department of State in view of the fact that plaintiff refused to explain or deny the allegations against him contained in the letter tentatively denying his passport application.

11. Defendant admits that plaintiff filed an appeal with the Board of Passport Appeals. Further answering, defendant avers that plaintiff was advised that the Board of Passport Appeals was established to act on appeals and decisions adverse to a passport applicant and since plaintiff had refused to comply with the regulations, the Board of Passport Appeals had no authority to act.

12. The allegations contained in paragraph 12 of the complaint state conclusions of law and therefore do not require answer but if answer be required, defendant denies the allegations contained therein.

13. Denied.

14. The allegations contained in paragraph 14 of the complaint state conclusions of law and therefore do not require answer but if answer be required defendant denies the allegations contained therein.

WHEREFORE, defendant having fully answered the allegations contained in the numbered paragraphs of the complaint, demands judgment together with costs of this suit.

Filed Feb. 1, 1956

Plaintiff's Motion for Summary Judgment

Now comes the plaintiff by his attorneys and, pursuant to Rule 56 of the Federal Rules of Civil Procedure moves the Court to enter summary judgment for the plaintiff on the ground that there is no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter of law. In support of this motion plaintiff refers to the entire record herein, including the pleadings and the affidavit of the plaintiff.

Filed Feb. 1, 1956

Motion for Preliminary Injunction

Plaintiff, by his attorneys, moves the Court for a preliminary injunction enjoining, pending the disposition of this action, the defendant, his officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with him from denying a passport to plaintiff, and directing the defendant to issue a passport

to the plaintiff for use during the pendency of this action.

The grounds of this motion are that unless so enjoined the defendant's action will cause the plaintiff irreparable injury before this cause can be disposed of.

In support of this motion plaintiff refers to the pleadings herein and to the affidavit filed by the plaintiff.

(Filed Feb. 1, 1956)

Affidavit of Walter Briehl

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

Walter Briehl, being duly sworn, deposes and says:

1. I am plaintiff in the above entitled suit. I make this affidavit in support of the motion for summary judgment and the motion for a preliminary injunction which have been filed herein on my behalf.

2. I have read the complaint filed in this action and know the contents thereof. All of the facts alleged in the complaint are true, and I incorporate them in this affidavit.

3. I obtained my licence to practice medicine in the State of New York in September, 1930, and I engaged in the practice of medicine as a licensed Doctor of Medicine, specializing in psychiatry, from 1930 to 1942 in the State of New York. From 1930 to 1931 I was assistant psychiatrist at the Mental Hygiene Clinic of Mt. Sinai Hospital in New York City. From 1931 to 1934 I was resident alienist at Bellevue Psychiatric Hospital, New York City. From 1934 to 1936 I was chief of the Mental Hygiene Clinic at Lebanon Hospital, Bronx, New York; from 1936 to 1946 I was Associate Attending Psyciatrist at Vanderbilt Clinic, Medical Center, New York City, and during the period, Associate, Department of Psychiatry, College of Physicians and Surgeons, Columbia University, New York City.

4. From 1942 to 1946 I was on military leave from the last mentioned appointments and positions. During my forty-two months of military service I held successively, the ranks of Major and Lieutenant Colonel. I served as Chief Psychiatrist at the Army Air Force Regional Hospital, Scott Field, Bellville, Illinois, and A.A.F. Station Hospital, Boca Raton, Florida. My military rating was "superior".

5. In 1946, following my separation from military service, I was licensed to practice in the state of California, and I have been engaged in the practice of psychiatry in this state continuously since 1946.

6. I am a member or fellow of the following professional societies:

American Medical Association
Los Angeles County Medical Association
California Medical Association
Fellow of the American Psyciatric Association
Fellow of the New York Academy of Medicine
Society for Psychiatric Medicine of Southern California
American Psychoanalytic Association
International Psychoanalytic Association
Los Angeles Psychiatric Society
Diplomate of the American Board of Psychiatry and Neurology
Southern California Psychiatric Society.

7. In the spring of 1953, I and my wife, who is a trained psychologist, applied for passports to attend meetings of the International Psychoanalytic Congress and of the World Federation for Mental Health, which in that year were being held in London and Vienna respectively. My wife and I obtained passports for that purpose in 1953. We attended the meetings mentioned, and we reported on the proceedings at those meetings to our professional societies in Los Angeles.

8. Our passports were scheduled to expire in May of 1955. In April, 1955, my wife and I filed passport renewal appli-

cation forms, sending along our 1953 passports. Approximately four weeks after our 1955 renewal applications we received letters dated May 13, 1955, from the State Department stating that our requests were being considered "under the provisions of the 'Supplement to Passport Regulations.'" The letter to me, a copy of which is annexed hereto as Exhibit 1, further stated:

> "In this connection, it would be helpful to the
> 22 Department "if you furnish an affidavit setting forth whether you are now or ever have been a Communist, and explain your connection with the Bookshop Association, St. Louis, Missouri; the Civil Rights Congress; the Hollywood Arts, Sciences and Professions Council; and the Los Angeles Committee for the Protection of Foreign Born. Your affidavit should set forth your connection with any other Communist front organization with which you may have been associated."

9. The State Department's letter of May 13, 1955, to my wife contained a request for "an affidavit setting forth whether you are now or ever have been a Communist," and her "connection with the People's Educational Center and the California Labor School."

10. Upon receiving the aforementioned letters of May 13, 1955, from the State Department, my wife and I consulted an attorney, Daniel G. Marshall, Esq., of Los Angeles, California. Under date of May 20, 1955, Mr. Marshall wrote to the State Department a letter (annexed hereto as Exhibit 2) advising that my wife and I were unwilling to submit the affidavits requested, our refusal being based on several constitutional grounds. Mr. Marshall's letter set forth also the facts regarding the scientific purpose and importance of our proposed trip—which was, as in 1953, to attend meetings of the professional societies earlier mentioned, the 1955 meetings being scheduled to take place in Geneva and in Istanbul. Mr. Marshall's letter stated:

> "Attendance at such International conferences has as its purpose the free interchange of professional informa-

tion and opinion and is a necessary part of the maintenance of their [my wife's and my] high professional standards in the practice and teaching of psychiatry, psychoanalysis and mental hygiene. Interference with their right to attend such conferences is an unwarranted invasion of the traditional relationship between patients and practitioners of "the healing arts. Obviously, these purposes promote the national interests of this country and have no rational connection with 'security considerations.'"

11. Further, Mr. Marshall specifically called the State Department's attention to the fact that my wife and I were scheduled to depart from New York on June 26, 1955, on a specific airline flight. Mr. Marshall's letter set forth also a brief resume of my and my wife's professional background and concluded:

> "Demand is hereby made that passports as applied for by them should be issued forthwith. Kindly telegraph collect your disposition of this demand."

12. The State Department did not send the requested telegraphic reply or otherwise answer Mr. Marshall. On May 31, 1955, it wrote me a letter, annexed hereto as Exhibit 3, stating that it was "obligated" to disapprove our requests for passports "on the ground that the granting of such further passport facilities is precluded under the provisions of Section 51.135 of Title 22 of the Code of Federal Regulations." It added:

> ". . . it is alleged that you were a member of the Los Angeles County Communist Party; that you were a member of the Bookshop Association, St. Louis, Missouri; that you held Communist Party meetings; that in 1936 and 1941 you contributed articles to the Communist Publication "Social Work Today"; that in 1939, 1940 and 1941 you were a sponsor to raise funds for veterans of the Abraham Lincoln Brigade in calling on the President of the United States by a petition to defend the rights of the Communist Party and its mem-

bers; that you contributed to the Civil Rights Congress bail fund to be used in raising bail on behalf of convicted Communist leaders in New York City; that you were a member of the Hollywood Arts, Sciences and Professions Council and a contact of the Los Angeles Committee for Protection of Foreign Born and a contact of the Freedom "Stage, Incorporated.

24 "Under Section 51.137 of the Regulations you may present your case and all relevant information informally to the Passport Office. If you desire to take advantage of this provision you may appear before a hearing officer of the Passport Office and you may be represented by counsel. In such case, you will be required to submit a sworn statement as to whether you are now or ever have been a Communist.

"If you do not desire a hearing, the Department will give consideration to any written statement under oath which you may desire to submit concerning the matter, provided that you include therein a statement as to whether you are now or ever have been a Communist."

The Department's letter of the same date to my wife essentially reiterated the Department's allegations of May 13th.

13. Under date of June 9, 1955, my attorney, Mr. Marshall, wrote to the State Department, stating in part that my wife and I "do not choose to offer any evidence in support of their applications for passports unless and until they are confronted with the informers your letter stated have furnished you with proof that they have been, are, or intend to engage in acts contrary to the national interests of this country." (The above-mentioned letter is annexed hereto as Exhibit 4.)

14. Some three weeks after the last-mentioned letter from Mr. Marshall to the State Department, no reply having been received, Mr. Marshall again wrote to the Department on June 29, 1955, calling attention to the then just rendered court decision in the case involving the

passport application of Dr. Otto Nathan. Mr. Marshall requested the State Department to grant an evidentiary hearing of the type required in the *Nathan* case, for the purpose of establishing the facts which led to the Department's tentative disapproval of my passport application, as advised in the Department's letter of May 31, 1955, mentioned above, (Mr. Marshall's letter of June 29, 1955, is annexed hereto as Exhibit 5.)

25 15. The State Department continued to do nothing. Mr. Marshall waited another three weeks and then, on July 20, 1955, he again wrote to the State Department renewing his previous demands on my behalf (Letter of July 20, 1955, annexed hereto as Exhibit 6.) In the said letter Mr. Marshall informed the Department that I had been appointed as Delegate of the American Psychoanalytic Association to the World Federation of Mental Health at Istanbul from August 21 to August 26, 1955. He called attention to the fact that the State Department was ignoring our repeated letter demands, and he protested against the irreparable damage which Department was doing to me "professionally and personally." Mr. Marshall's aforementioned letter of July 20, 1955, crossed in the mail with a letter to him from the State Department dated July 19, 1955, which stated:

> "You are informed that if Dr. and Mrs. Brield desire the Department to give further consideration to their cases, they should proceed in accordance with the procedures outlined in the Passport Regulations."

16. Mr. Marshall promptly replied on July 25, 1955, demanding a hearing at Los Angeles (See Exhibit 7 annexed hereto). The Department, abiding by its seemingly standard lag of three weeks before answering passport correspondence, wrote to Mr. Marshall under date of August 17, 1955, stating that I and my wife would be given "an informal hearing of the nature outlined in Section 51.137 of the Passport Regulations", at Washington, on August 30, 1955. (Exhibit 8, annexed hereto).

17. A so-called hearing in my case was accordingly held on August 30, 1955, at Washington, D. C. (Copies of the stenographic transcript and of an article referred to therein are annexed hereto as Exhibits 9 and 10 respectively). The hearing was of an informal nature. Present with me at the hearing was Leonard B. Boudin, Esq., whom I had engaged as co-counsel with Mr. Marshall.

18. The State Department's representative at the hearing, Mr. Ashley Nicholas, Deputy Director of the Passport Office, who was accompanied by another departmental official, Mr. Frans Mathes, repeatedly asked me whether I would make a non-Communist affidavit of the type above described. I and my attorney repeatedly stated that the State Department ought to present evidence in support of its allegations or suspicions concerning my alleged affiliations, and that the witnesses or informers in the case ought to be brought forward so that I might confront them. My reasons, as a scientist and professional man, for desiring a passport were set forth in detail. My standing and background as a scientist and professional man were likewise set forth in detail. Both my attorney and I repeatedly requested Mr. Nicholas, alternatively (1) to approve the granting of a passport to me forthwith on the basis of my contention that I was lawfully entitled thereto and that the Department's objections or conditions were unlawful; or (2) to produce forthwith or reasonably promptly the evidence, if any, supporting the State Department's allegations against me; or (3) to make a decision forthwith or with reasonable promptness wherein the State Department should declare or rule as a matter of official action and record that it had finally determined to refuse me a passport.

26

19. The last mentioned request, i.e., the request for a final decision refusing me a passport, was repeatedly explained to and urged upon Mr. Nicholas by my attorney and by me as essential for the purpose of laying the groundwork for an appeal to the State Department's Board of

Passport Appeals. Mr. Nicholas' rulings upon the record regarding my alternative requests were as follows: (1) My demand for the immediate issuance of a passport was not granted. (2) I was not to have an evidentiary hearing. (3) But at the same time I was not to have a clear, definite or final ruling, such as would entitle me (according to the State Department's procedures) to carry the matter before the Board of Passport Appeals. Mr. Nicholas' only apparent reason for this utterly hamstringing set of rulings was that the State Department was unwilling or unable to process my matter any further so long as I adhered to my declination to submit an affidavit relating to the charges of political or other organizational affiliations or activities which the State Department, without disclosed
27 proof or particulars of any kind, was making.

20. Immediately upon the conclusion of the said so-called hearing on August 30, 1955, my attorney, Mr. Boudin, telephoned John W. Sipes, Esq., the counsel of the Board of Passport Appeals, requesting a review of Mr. Nicholas' rulings. Mr. Sipes suggested to Mr. Boudin that the said request be confirmed in writing, which Mr. Boudin did under date of August 31, 1955. (Exhibit 11, annexed hereto). Mr. Boudin also wrote to Mr. Nicholas the same day, requesting that Mr. Nicholas render a decision within a few days, so that the matter might become ripe for consideration by the Board of Passport Appeals, (Exhibit 12, annexed hereto).

21. By letter of September 2, 1955, Mr. Sipes advised Mr. Boudin that the Board of Passport Appeals "could not entertain an appeal . . . at this time." (Exhibit 13, annexed hereto).

22. On September 12, 1955, Mr. Boudin wrote again to Mr. Nicholas inquiring as to the status of the matter and requesting Mr. Nicholas to telephone immediately collect. The latter request was ignored by the State Department.

but under date of September 16, 1955, the Director of the Passport Office, Miss Frances G. Knight, wrote Mr. Boudin that because of my refusal to "explain or deny the allegations" or to submit a non-Communist affidavit, "the Department knows of no further action which it can appropriately take in the case of Dr. Briehl." (See Exhibit 14, annexed hereto).

23. The above letter from Miss Knight explicitly speaks for "the Department", thus indicating that it was intended by the Department of State to indicate that its action in my case was final at all levels of the Department—namely, a refusal to do anything whatsoever about my passport application because I was refusing to give the Department the requested affidavit about my political beliefs and associations.

24. Even though Miss Knight's letter of September 16, 1955, appeared to be intended as the final word on the subject by the State Department as a whole, my attorney, Mr. Boudin, made final efforts to explore the avenue
28 of appeal to the Board of Passport Appeals, requesting to be advised whether the Board would entertain an appeal where the Passport Office took the position that it would simply refuse to render a decision because of the passport applicant's refusal to execute the requested affidavits. (Exhibits 15, 16 and 17, annexed hereto). Mr. Sipe replied under date of September 29, 1955, stating that the Board of Passport Appeals acted on appeals from "decisions adverse to the Passport applicant" and that "the Board is unaware of such an adverse decision in Dr. Briehl's case." (Exhibit 17 annexed hereto.)

25. The same professional reasons for travel that existed in 1955 prevail today. The Freud Psychoanalytical Centennial will be held in London on May 6th, 7th and 8th, 1956. The World Federation for Mental Health will be held in Munich the B. J. M. N.P. in August, 1956. I wish to attend at least one and possibly both of these confer-

ences. I cannot do so unless the defendant renews and returns my 1953 passport to me.

WALTER BRIEHL
Walter Briehl

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29 **Exhibit 1**

DEPARTMENT OF STATE
WASHINGTON

Filed Feb. 1, 1956

May 13, 1955

In reply refer to
F139, Briehl, Walter

Dr. Walter Briehl
2060 North Vine Street
Los Angeles 28, California

Dear Dr. Briehl:

The Department has received your recent request for the renewal of passport No. 107673, which was issued to you on May 6, 1953.

You are informed that your request is being considered under the provisions of the Supplement to Passport Regulations, copy of which is enclosed. In this connection, it would be helpful to the Department if you would furnish an affidavit setting forth whether you are now or ever have been a Communist, and explain your connections with the Bookshop Association, St. Louis, Missouri; the Civil Rights Congress; the Hollywood Arts, Sciences, and Professions Council; and the Los Angeles Committee for the Protection of the Foreign Born. Your affidavit should

set forth your connection with any other Communist front organizations with which you may have been associated.

Sincerely yours,

FRANCES G. KNIGHT
Frances G. Knight
Director, Passport Office

Enclosure:
Supplement to Passport Regulations

Exhibit 2

Filed Feb. 1, 1956

DANIEL G. MARSHALL
Attorney at Law
786 Occidental Life Building
1151 South Broadway
Los Angeles 15, California
Richmond 7-9392

May 20, 1955

The Secretary of State
Washington 25, D. C.

Attention: Frances G. Knight, Director, Passport Office

Your Reference:
F 130—Briehl, Walter
130—Briehl, Marie Hurwitz

Dear Sir:

Dr. Walter Briehl and his wife, Marie Hurwitz Briehl, 2060 North Vine Street, Los Angeles 28, California, have referred to me for answer your letter to them of May 13, 1955.

My clients refuse to submit the affidavits your letters request. Your demands and the vague and formless standards of the passport regulations under which you purport to act are palpable violations of their Constitutional rights, including, but not limited to, the First, Fifth, Ninth and Tenth Amendments.

My clients planned their trip abroad to attend scientific conferences of the International Psychoanalytic Congress in Geneva and the World Mental Health Congress in Istanbul. Attendance at such International conference has as it purpose the free interchange of professional information and opinion and is a necessary part of the maintenance of their high professional standards in the practice and teaching of psychiatry, psychoanalysis and mental hygiene, interference with their right to attend such conference is an unwarranted invasion of the traditional relationship between patients and practitioners of the healing arts.

Obviously, these purposes promote the national interests of this country and have no rational connection with "security consideration."

My clients have incurred expense and will incur substantial financial loss in the event passports are refused them for their scheduled departure from New York on June 26, via KLM.

Dr. Briehl served three and one-half years as a Major and Lieutenant Colonel in the United States Air Force Medical Corps. His professional memberships include International Psychoanalytic Association, The American Psychoanalytic Association, and Society for Psychoanalytic Medicine of Southern California. He holds fellowships in the New York Academy of Medicine and the American Psychiatric Association.

Mrs. Briehl is a child psychoanalyst of long and varied experience.

Demand is hereby made that passports as applied for by them be issued forthwith.

Kindly telegraph collect your disposition of this demand.

Yours very truly,

DANIEL G. MARSHALL

DGM:JM
Enclosure: Copy this letter

AIRMAIL

31 **Exhibit 3**

Filed Feb. 1, 1956

May 31, 1955

In reply refer to
F130—Briehl, Walter

Dr. Walter Briehl
2060 North Vine Street
Los Angeles 28, California

Dear Dr. Briehl:

The Department has received a letter dated May 26, 1955 from your attorney in which he states that you decline to furnish the Department with the affidavit which was requested in the Department's letter to you dated May 13, 1955.

I regret to inform you that after careful consideration of your application for the renewal of passport facilities, the Department of State is obliged to disapprove your request tentatively on the ground that the granting of such further passport facilities is precluded under the provisions of Section 51.135 of Title 22 of the Code of Federal Regulations. A copy of the pertinent Regulations is enclosed for your information.

In cases coming within the purview of the Regulations above referred to, it is the practice of the Department to inform the applicant of the reasons for the disapproval of his request for passport facilities insofar as the security regulations will permit. In your case it has been alleged that you were a Communist. Specifically it is alleged that you were a member of the Los Angeles County Communist Party; that you were a member of the Bookshop Association, St. Louis, Missouri; that you held Communist Party meetings; that in 1936 and 1941 you contributed articles to the Communist Publication "Social Work Today"; that in 1939, 1940 and 1941 you were a sponsor to

raise funds for veterans of the Abraham Lincoln Brigade in calling on the President of the United States by a petition to defend the rights of the Communist Party and its members; that you contributed to the Civil Rights Congress bail fund to be used in raising bail on behalf of convicted Communist leaders in New York City; that you were a member of the Hollywood Arts, Sciences and Professions Council and a contact of the Los Angeles Committee for Profection of Foreign Born and a contact of the Freedom Stage, Incorporated.

Under Section 51.137 of the Regulations you may present your case and all relevant information informally to the Passport Office. If you desire to take advantage of this provision you may appear before a hearing officer of the Passport Office and you may be represented by counsel. In such case, you will be required to submit a sworn statement as to whether you are now or ever have been a Communist.

If you do not desire a hearing, the Department will give consideration to any written statement under oath which you may desire to submit concerning the matter, provided that you include therein a statement as to whether you are now or ever have been a Communist.

32 You are assured that any information or evidence which you may supply will receive most careful consideration and that every effort will be made to act upon your application promptly and justly. The Department desires to emphasize that the passport records are confidential Government records and any information which you may submit or which may be received from other sources in connection with your application will not be made known to the public or to any unauthorized person unless you release it. The Department reserves the right to disclose factual information to supplement or correct any statement which a passport applicant may release for publication concern-

ing the reasons why he was denied a passport or enter the Department's action in this case.

If a reply to this letter is not received within thirty days, it will be assumed that you do not wish to have your case reconsidered at this time.

Sincerely yours,

For the Secretary of State.

FRANCIS G. KNIGHT
Director, Passport Office

33

Exhibit 4

Filed Feb. 1, 1956

June 9, 1955

The Secretary of State
Washington 25, D. C.

Attention: Francis G. Knight, Director, Passport Office

Your Reference:
F 130, Briehl, Walter
F 130, Briehl, Marie Hurwitz

Dear Sir:

My clients above named have referred to me for letter to them of May 31st.

They wish you to be advised that they do not choose to offer any evidence in support of their applications for passports unless and until they are confronted with the informers your letter states have furnished you with proof that they have been, are, or intend to engage in acts contrary to the national interests of this country.

The demand to be confronted with these informers is without prejudice to their objections to Title 22, Chapter

, Part 51, of the Code of Federal Regulations, as stated
n my letter to you of May 20, 1955.

Yours very truly,

DANIEL G. MARSHALL.

DGM:JM

Exhibit 5

34

Filed Feb. 1, 1956

June 29, 1955

Secretary of State
Washington 25, D. C.

Re:
F 130, Briehl, Walter
F 130, Briehl, Marie Hurwitz

Dear Sir:

In view of the decision in the case involving the passport application of Dr. Otto Nathan, my clients, above named, demand an evidentiary hearing or to be confronted with the evidence, if any, which lead to the tentative disapproval of the application of my clients for renewal of passport facilities, of which disapproval you advised under date of May 31, 1955.

In view of the fact that my clients will suffer irreparable and substantial damages in the event of your continued refusal to renew their passport facilities, said hearing is demanded within 15 days from the date hereof.

This demand is made without prejudice to the rights of my clients as stated in my letter to you of May 26, 1955.

Kindly acknowledge receipt of this letter on the enclosed copy.

Yours very truly,

DANIEL G. MARSHALL

DGM:JM
airmail-special delivery
cc: Dr. and Mrs. Walter Briehl

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35 **Exhibit 6**

Filed Feb. 1, 1956

July 20, 1955

The Secretary of State
Washington 25, D. C.

Attention: Frances G. Knight, Director, Passport Office

Your reference:
F 130, Briehl, Walter
F 130, Briehl, Marie Hurwitz

Dear Sir:

My client, Dr. Walter Briehl, has been advised that he has been appointed a delegate of the American Psychoanalatic Society to the World Federation of Mental Health at Istanbul from August 21 to August 26, 1955.

Under date of June 29 the writer repeated the demand of Dr. Briehl and his wife, Marie Hurwitz Briehl, for issuance to them of passport facilities. No reply has been received.

This demand is hereby repeated. Your refusal to issue promptly the requested passport facilities seriously and

irreparably damages my clients, professionally and personally.

Please acknowledge receipt of this letter.

Very truly yours,

DANIEL G. MARSHALL

DGM:JM
Airmail
Special Delivery

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36 **Exhibit 7**

Filed Feb. 1, 1956

July 25, 1955

The Secretary of State
Washington 25, D. C.

Attention: Frances G. Knight, Director, Passport Office

Your reference:
F 130, Briehl, Walter
F 130, Briehl, Marie Hurwitz

Dear Sir:

This will acknowledge receipt of your letter of July 19th, replying to my letter of June 29th. Under date of July 20th the demand of my clients for passport facilities was repeated, without reply, however, from you.

In view of the tentative disapproval by you under date of May 31st, my clients are now entitled to appear in person before a hearing officer of the Passport Division under Section 51.137 of Title 22 of the Code of Federal Regulations, as that provision has been construed in the Nathan, Foreman, Schachtman and Kamen decisions.

All previous demands of my clients, contained in my earlier correspondence with your office, are hereby re-

peated, particularly, but not limited to, the demands for a hearing at Los Angeles forthwith.

Yours very truly,

DANIEL G. MARSHALL

DGM:JM.
Airmail

P.S. Please note the change of address of the writer since my last letter.

DGM

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37 **Exhibit 8**

Filed Feb. 1, 1956

DEPARTMENT OF STATE
WASHINGTON

Aug. 17, 1955

In reply refer to
F 130—Briehl, Walter
F 130—Briehl, Marie Hurwitz
Mr. Daniel G. Marshall
Attorney at Law
4041 Maritan Avenue
Los Angeles 8, California

Dear Mr. Marshall:

The Department has received your letter of July 25, 1955 with further reference to the passport case of Walter Briehl and Marie Hurwitz Briehl.

You are informed that the Department is prepared to accord Mr. and Mrs. Briehl, at Washington, on Tuesday, August 30, 1955 an informal hearing of the nature outlined in section 51.137 of the Passport Regulations.

Sincerely yours,

FRANCES G. KNIGHT
Frances G. Knight
Director, Passport Office

38 **Exhibit 9**

TRANSCRIPT OF INFORMAL HEARING IN PASSPORT OFFICE

39 Filed Feb. 1, 1956

This will be a record of an informal hearing as provided in Section 51.137 of the Passport Regulations. Present are Dr. Walter Briehl and his attorney, Mr. Boudin, and for the State Department, Mr. Nicholas and Mr. Franzmathes.

Mr. Nicholas: Dr. Briehl, this is the hearing as provided in Section 51.137 of the Passport Regulations and it is for the purpose of affording you an opportunity to either deny or to explain the allegations set forth in the Department's tentative refusal letter to you dated May 31, 1955. You received the letter, did you?

Dr. Briehl: Which one? Yes, I believe I received a letter from you, I don't recall the date but it was certainly a letter of allegations.

Mr. Nicholas: Are there any questions you wish to ask about the contents of the letter?

Dr. Briehl: I am represented by my attorney, Mr. Boudin, and I will request him to answer in respect to these allegations.

Mr. Boudin: Mr. Nicholas, in the Spring of 1953, Dr. and Mrs. Briehl applied for passports to attend the meeting of the International Psychoanalytic Society at London, England, and the World Federation of Mental Health in Vienna. They obtained passports and attended those meetings and reported on the transactions at those meetings to their societies in Los Angeles. I am, of
40 course, referring to their professional societies. These passports expired in May of 1955. On April, 1955, Dr. and Mrs. Briehl filed renewal application forms which with the expired passports were sent to Washington.

It was not until about four weeks later that they received letters from the Passport Office stating that passports would not be issued on Security grounds and circumstances contrary to the national welfare. May I see a copy of those letters, if you will? Mr. Nicholas hands Mr. Boudin the passport renewal application of Dr. Briehl.

I am now looking at the passport renewal application of Dr. Briehl which indicates that the renewal fee was received by the Passport Office in Washington on April 13, 1955. It also appears from the application that Dr. Briehl stated that he wished to depart from New York on July 3, 1955 for two months by KLM to visit the countries of Ireland, England, Switzerland, France, Germany, Austria, Turkey, Italy, and Greece. It also appears from the application that the purpose of the trip was "International Psychoanalytic Congress—Geneva, and World Mental Health Organization Congress—Istanbul. The letter which was sent by the Department, to which I referred, was referred to Dr. Briehl's attorney, Mr. Daniel Marshall of California, who I understand wrote a letter of protest and a demand for the passports forthwith. I should appreciate seeing a copy of that letter.

Mr. Nicholas points out the letter: I have just examined
41 the letter which is dated June 9, 1955 and sent from California by Mr. Marshall to the Secretary of State—Attention of the Director of the Passport Office. Now this letter states the following:

"My clients, above named, have referred to me for answer your letter to them of May 31st. They wish you to be advised that they do not choose to offer any evidence in support of their applications for passports unless and until they are confronted with the informers your letter states have furnished you with proof that they had been, are or intend to engage in acts contrary to the national interest of this country.

"They demand to be confronted with these informers without prejudice to their objections to Title 22, Chapter

1, Part 51 of the Code of Federal Regulations as stated in my letter to you of May 20, 1955."

Oh, I see, you have given me, Mr. Nicholas, the second letter sent by Mr. Marshall not the first to which I referred. (Mr. Nicholas hands him the letter of May 20, 1955). Yes, I have now seen Mr. Marshall's letter of May 20, 1955 to the Secretary of State in which he states among other things:

"My clients planned their trip abroad to attend scientific conferences of the International Psychoanalytic Congress in Vienna and the World Mental Health Con-
42 gress in Istanbul. Attendances such as the national conferences has as it's purpose the free interchange of professional information and opinion and is a necessary part of the maintenance of their high professional standards in the practice teaching of psychiatry, psychoanalysis, and mental hygiene. Interference with their right to attend such conferences is an unwarranted invasion of the traditional relationship between patients and practitioners of the healing arts.

"Obviously these purposes promote the national interests of this country and have no rational connections with "Security Consideration". The letter adds—a relevant part—"My clients have incurred expense and will incur substantial financial loss in the event passports are refused them for their scheduled departure from New York on June 26, 1955 via KLM.

"Mr. Briehl served three and one-half years as a Major and Lieutenant-Colonel in the United States Air Force Medical Corps. His professional memberships include the International Psychoanalytic Association, The American Psychoanalytic Association, and The Society for Phychoanalytic Medicine of Southern California. He holds fellowships in the New York Academy of Medicine and the American Psychiatric Association."

43 And the letter concludes, after other statements with the following:

whether he is a delegate or not, although in this particular case Dr. Briehl was, of course, a delegate of an important and honorable association in this country. Our first point, therefore, is that medicine has nothing to do with politics and you may not introduce and confuse the issue of his right to practice medicine and his right to study, and his right to participate in conferences by injecting this issue of
politics in connection with his travel abroad. When
46 a physician has a legitimate purpose in going abroad as was stated here, all issues of political affiliations, past or present, definite or indefinite, good or bad, are irrelevant. That will be our first point. Now you know, or you should know, if your files are complete, that Dr. Briehl has a long and honorable record in the field of medicine. I will just indicate here so that you can have it for your records, a brief resume of some of the points in his medical history. He took pre-medical studies at Columbia University from 1920 to 1923; He attended a school of medicine at the University of Vienna in Austria from 1924 to 1930 securing his degree of medicine in June 1930; He was licensed in New York State on September 1930 and practiced psychiatry in New York from 1930 to 1942; He was an assistant phychiatrist at Mount Sinai Hospital in New York City from 1930 to 1931; He was resident alienist at Bellevue Psychiatric Hospital in New York City from 1931 to 1934; He was chief of the Mental Hygiene Clinic, Lebanon Hospital, Bronx, New York from 1934 to 1936; He was associate attending phychiatrist at Vanderbilt Clinic and associate in phychiatry at College of Physicians and Surgeons, New York City, from 1936 to 1946; He was on military leave from 1942 to 1946; He served 42 months as a Major and Lieutenant-Colonel; Was Chief Psychiatrist of the Army Air Force Regional Hospital at Scott Field, Bellville, Illinois. He had a superior military rating and in 1946 he was licensed in California and has practiced
psychiatry in California since 1946. Your records
47 should also show, if they do not, that he is a member of the Society for Psychoanalytic medicine in

Southern California; He is a member of the American Psychoanalytic Association, the International Psychoanalytic Association, the Los Angeles Psychiatric Society and he is also a fellow of the American Psychiatric Association and a fellow of the New York Academy of Medicine In addition, he is a diplomat of the American Board of Psychiatric and Neurology. Now, under those circumstances, knowing these facts as you must have known them—and certainly knowing some of them by correspondence, it was the duty of the Department, in our view, to give Dr. Briehl a passport which he sought and the failure of the Department to give him that passport was not only wrong but we think unlawful. The damage which has been caused him, you already know, by his failure to attend the conferences and the delays which are indicated here in the correspondence with the Department are equally and unfortunately a part of a pattern which I have previously discussed with the Department and which apparently continues to be in effect. We are looking not only to the past but to the future. Dr. Briehl will be attending medical conferences in Europe next year. Similar conferences are held annually. He, will undoubtedly, attend them as a delegate. He will, also, of necessity in connection with attending those conferences want to travel in Europe for pleasure and for educational work due to his profession. For these reasons we are now appearing here not only to re-
48 request the renewal of the passports and to call the attention of the Department to the wrong which they did him but to be sure that this does not occur again so that he can make arrangements to go to Europe next year without any feeling of having to go through these expensive negotiations with the Department, Departmental conferences, and hearings again. Now I turn, now, to the second point but only briefly because it isn't necessary for us to rely upon it—the point I make is on behalf of Dr. Briehl. It is our position that, of course, every American citizen has the right to travel regardless of politics.

We don't think that members of a single profession are the only ones who are entitled to travel and, of course, in discussing my first point I was merely emphasizing the legitimate function which he was carrying out rather than to argue that membership in the profession gave one a particular right to travel. My second point is that everyone has the right to travel regardless of political considerations. The reservations made by Mr. Marshall with respect to the legality of the Regulations I, of course, reaffirm and we do not in appearing here agree that the Regulations are either completely or substantively agreed to or accepted as valid under the laws of the United States or the Constitution of the United States. Now we turn to the third point. You have made certain allegations against Dr. Briehl and we have requested by letter, the letter being that of Mr. Marshall specifically, that you confront us with the evidence against Dr. Briehl.

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Now the reason for this is as follows: it is our judgment that the Department has followed a practice of charging a person with membership in the Communist Party not on the basis of evidence in its files, not even on the basis of evidence not disclosed to us, but that this is a generalized conclusion which the Department throws in on the basis of a pattern of conduct of which it disapproves and which it decides to put in as a final, what we would call in the vernacular, killer-diller and this has been, I am persuaded of this fact, by my experience in the cases of Dr. Nathan and Dr. Forman where the Department quite improperly and untruthfully and incorrectly charged membership in the Communist Party, and thereafter, in the course of litigation gave passports to both of these persons who were clients of mine. Both of these persons made affidavits, Dr. Forman and Dr. Nathan, stating that they had never been members of the Communist Party and, of course, the Department disregarded those affidavits in the long proceedings before it. We think that the time has come for the Department to support allegations of

this general nature and of this seriousness and that before it makes accusations of this kind in future cases that it is up to the Department to be satisfied that the accusations are truthful in its own view. It is up to the Department to support those allegations by evidence and witnesses which we can examine and confront. In the particular case we are satisfied that this Department will never, can never and doesn't intend to, and in fact that there is no evidence, which would support an allegation as to membership in the Communist Party as far as Dr. Briehl is concerned. But we do not propose, very frankly, to subject ourselves to an interrogation concerning political views and associations and to give the Department a substitute, because that is what it is seeking here, a substitute for its burden of proving allegations of this character. In other words, we think that if the Department truthfully thinks, and I don't think it thinks so, that it has any evidence to support the allegation that Dr. Briehl is a member or was a member of the Communist Party, it is the duty of the Department to produce that evidence here through witnesses and we will subject those witnesses to cross-examination. Now I am, of course, quite candidly satisfied that there are no witnesses. These are not facts, the Department isn't prepared to prove it and the Department is relying upon this concept of security in making a charge which it is not required, in its view, and, of course, not able to factually prove. But, our position is that the time has now come after a series of these cases in which charges of Communist Party membership have been made for the Department to put-up or shut-up frankly in this area and we take the position, very firmly, both as a matter of improving the behavior of Governmental Departments and, specifically, the Passport Office and, secondly, on a basis of considerations of process which seem very important to us and, we think to the courts that the Department cannot make allegations of this kind unless it has somewhere evidence to support

the allegation. These loose accusations have to stop and this is the point at which we are going to stop them and so, we now say to you that we want you to produce today or tomorrow, although it was your duty to produce them today, the witnesses upon which you rely if they exist which we deny, to support these allegations of membership in the Communist Party and, if you cannot, tell me, now that you cannot and admit that you cannot support those allegations, then it is your duty as Government officials to withdraw those charges. As far as the other charges are concerned we think there, too, it is your duty to prove each one of these points and we will expect you to withdraw these allegations today and all of them unless you are prepared to prove them. And we have a very practical problem involved more specifically with respect to these allegations. We think that allegations of this kind have no meaning unless the Department is prepared to prove not only the facts but wherein the acts charged are wrong. In short, where the Department charges, for example, that someone signed a petition for the Abraham Lincoln Brigade, it would be up to the Department to prove not only the fact of the signing of the petition in accordance with our theory of an accusatorial system of law in which the Government proved allegations of alleged wrong doings but it is up to the Department to prove why that was wrong if it can prove the facts. The right of petition for example, is guaranteed in certain respects by the Constitution of the United States. If the Department is referring to something that is covered by the right of petition under the first amendment then obviously the Department is not making a charge of wrongdoing cognizable anywhere or the right of petition may not be within the technical petition provision of the first amendment but may be an example of the right of free speech which is being exercised. In short that, and I am merely taking that as an example, is what I regard as the duty of the Department in all of these cases and a duty

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that we intend to do whatever we can to compel the Department to adhere to. Now it may ultimately turn out that the Department will find itself confronted with the fact that all of the wrongful acts charged against people in passport cases, not only against Dr. Briehl, are acts which are perfectly lawful and in fact constitutionally protected such as the right of association or the right to put up bail or the right to be a member of an organization or the right to take out books and even the right to read books may be constitutionally protected but that is the Department's problem and it may point up the fact that substantively the Department's Regulations are unconstitutional as we have alleged. We are now discussing, however, the procedural problem and I want to emphasize that . . . that we have a right to what the courts have now called a quasijudicial hearing, although we called it by other technical terms in litigation in the Nathan-
53 case, and that it is the Department's job to prove not only the facts with respect to each of these allegations but it is the Department's job to prove wherein each of these activities was wrong and wherein the activities were in violation of the laws of the United States. This is the duty which the Department has today and which I am confident it is not prepared to sustain today or any other day. Now perhaps since I have discussed this matter after talking to Dr. Briehl about it, he would like to add something before I raise one other problem.

Dr. Briehl: I think my attorney, Mr. Boudin, has stated my case. Of course, I, as a litigant in the matter, am very much interested in this matter of allegations and I certainly would like to know the nature of this whole matter and in this respect I would like to ask Mr. Nicholas a question. What article did I write in this so-called Communist publication? Do you wish to answer that, Mr. Nicholas?

Mr. Nicholas: I assume the article you refer to is that one which appeared in Social Work Today. We do not appear to have a text of the article.

Dr. Briehl: That is Mr. Nicholas, acknowledges that he has not read the article and has not seen it. On what basis then does he draw up an allegation then when he is totally unfamiliar with the content of this allegation? May I also ask him whether he has read Social Work Today so that he might use his own judgment as to the nature of my Article?

54 Mr. Nicholas: I do not read the particular magazine and the Department's evaluation of it is based on information from another agency of the Government which is better qualified than I.

Dr. Briehl: Inasmuch as Mr. Nicholas is an authorized representative of the Passport Office before he makes an allegation of this kind against my professional integrity in denying me a passport to go to a medical meeting, I think it is his solemn duty to familiarize himself with these proceedings before he asks me to make an affidavit to deny any of these statements with which he is unfamiliar. In this same vein I am motivated to proceed with many of the other allegations which Mr. Nicholas has stated in his letters. As I believe in fundamental truths I think that this can be best established not by an affidavit but by permitting me and my attorney to be confronted with those who have made these allegations. I think this is the basic fact and I have asked in my interview with Mr. Nicholas on August 17th, that he cooperate with me. I clearly informed him at that time that representatives were misinforming him about these allegations. He simply reiterated the problem over and over again. Do you wish to make a statement denying that you are a Communist? I felt that this was basically irrelevant to the issue.

Mr. Boudin: Now this is our problem. We are here today to request the immediate renewal of the passports. Dr. Briehl will not be in the East more than an addi-

55 tional week, he is going back to California to resume his practice of medicine having a date now on the eve of the completion of his vacation in the East. We

should like to have a decision from the Passport Office today. You have had this file since April of 1955. It has now heard our formal position, heard our objections to procedures and to the regulations, it has heard our demands for the production of evidence and it would seem to me that the Department is either unwilling or unable to make the attempt to produce such evidence. Under these circumstances we have a right to the immediate issuance of the passports—that is the immediate renewal of the passports. Since the applications for these renewals have been in effect since April of 1955. Obviously, we want the renewals to be granted so that we are not again put in the position that we were in the months of April to date. Therefore, our request today is for the issuance of these passport renewals today. In the event that the Department is going to decide this case against us we request that the decision be made immediately and we should like the Passport Office to arrange for the immediate hearing of this case before the Board of Passport Appeals. The reasons for the immediate hearing are those which I've indicated before that the length of time that has elapsed since the filing of the applications for renewals, the gaps that have existed between the letters sent by or on behalf of Dr. Briehl and the Passport Office's responses—I won't go into the chronology at the moment—and finally
56 the fact that he must go back to California. I should like him to be present at the hearing before the Board of Passport Appeals even though that isn't required by the Regulations. It will still be desirable for him to be present so that he can present his case with the Board of Passport Appeals in the event that the Passport Office decides the case against us. I am aware of the fact that technically under the Regulations the Board of Passport Appeals is a different body but in my experience with the Board of Passport Appeals and my discussions with the Chairman or its counsel it is perfectly clear that it is part of the same office and that it regards itself

as being on a coordinate level, not technically in the sense of being a body superior to the Passport Office. Just to clarify that I may say that when at one time this office refused to render a final decision in the case of Dr. Otto Nathan, I met with the Chairman of the Board of Passport Appeals or Counsel and asked them to hear the appeal regardless of the refusal of this office to make a final decision and they told me that they were not an appellate body but only a coordinate level of a coordinate body and in that sense were not really an appellate body. The fact that you are all one group of officers in the Department of State, I am directing my requests to you, Mr. Nicholas, and ask that you make arrangements today before we leave for the Board to hear this matter, if we are to be denied the pasport renewal, and we will be prepared to stay on today and undoubtedly the Board can be convened
57 immediately since it consists of Departmental officers and is in my experience an ad hoc group which is no formal Board but a number of people assigned to the Board for particular cases. My request to you, Sir, now is as follows: We should like the passport renewals granted immediately. If they are not to be granted immediately, then we request that you give us your decision immediately. If the decision is going to be adverse to us, though I trust that it will not in view of the absence of evidence to support the Department's decision, then I should appreciate your calling immediately while I am here to the Chairman of the Board of Passport Appeals or Counsel and have this matter set down for argument since I am in Washington today with Dr. Briehl and it will be preferable that we hear the case today, of course. However, as I say, Dr. Briehl will be leaving the East the day after Labor Day and if it were absolutely necessary we could come back here tomorrow or the day after that for the purpose of appearing before the Board of Passport Appeals . . . excuse me a second.

Dr. Briehl: Mr. Nicholas, to the best of my knowledge and belief, I was giving the spirit and the sense of our interview. No human being is infallible and, if you wish to make any corrections on my remarks will you please do se . . . I am ready to be corrected if in any way I have misinterpreted or not understood the sense of your comments in our interview.

58 Mr. Nicholas: As far as I recall your comments were along the lines of our discussion. I don't remember the exact words and I assume you don't either. Do I understand that it is your position, Dr. Briehl that you will not file an affidavit of the nature outlined in Section 51.142 of the Passport Regulations?

Dr. Briehl: That is correct, Mr. Nicholas, for the reasons that my attorney has given. I gave further reasons in my interview, namely, there is some doubt in my mind whether the filing of the affidavit would not at a future date on some basis subject me to perjury. I take this position because from the nature of the allegations. I have some questions about the impartiality of the Passport Department in adequately evaluating my affidavit. These are some of the reasons why on this occasion, I must refuse the request that in order to obtain a passport to these Medical conferences that I give an affidavit.

Mr. Boudin: Let me just clarify one point as an attorney because I have discussed these problems with Dr. Briehl. As I say I've discussed these problems with Dr. Briehl and his very distinguished counsel, Mr. Daniel Marshall of California. Dr. Briehl was, of course, referring to a feeling which we have had which is that in inquiries of this kind, the use of the attest oath generally, whether by the Passport Office or elsewhere, is not an attempt to elicit a fact, not an attempt to elicit the truth, but a species of entrapment, an attempt by Governmental Agencies

59 in many cases to have something which they might conceivably hold over the heads of American citizens. Dr. Briehl was, of course, referring as I know from our

discussions to an unfounded prosecution for perjury such as I am convinced have occurred in a number of cases in this country in recent years. If your sources of information are accurate and, of course, in many cases they appear not to be, you will, of course, know of your own knowledge that Dr. Briehl isn't and never has been a member of the Communist Party. I have made this statement with respect to other clients of mine, namely, that if your security reports have any validity and any accuracy these facts are known to you, must be known to you or the people giving these reports. That, however . . . that, by the way, was the case with Dr. Nathan wohm you charged with being a member of the Communist Party and the case of Dr. Forman against whom you made a similar charge. The fact that you are not seeking information or facts and are not seeking the truth is indicated, I think, by the procedure followed by the Department in those other cases where if you had been seeking a fact you would have accepted the affidavit under oath made by the applicants for passports and, yet, except in the cases of litigation where court orders have either been issued or were on the eve of being issued, I know of no political case where a man who has been charged with membership in the Communist Party has filed an affidavit that he has never been a member of the Communist Party and yet received a passport unless he went to Court. Now I don't have all of the passport cases obviously in this Department but I have a pretty wide knowledge even of those which I don't have and I have made a study of the problem and I think that my statement is accurate, if I'm not, of course, I can be corrected but I'm sure the correction will be a minor deviation and my statement, in general, will stand. So our basic position is . . . that there is no real interest in relating the facts when the Department asks for such an affidavit; secondly, it does provide a species of pressure and coercion upon the conduct of the citizen in the future because anybody who signs one of these affidavits has to watch his con-

duct very carefully in the future in view of what the Department apparently consists to be Communist activities but the fundamental objection. I just wanted this to be perfectly clear, because it is the objection which I certainly raise at the instance of my various clients and which I raise here is, that if ours is an accusatorial system, then the Government must prove its charges and cannot substitute for proof, which is lacking, this kind of interrogation of an American citizen and so our answer is that for all of the reasons which have been given as well as the basic Constitutional objections to an attest oath which would apply in all areas and which would be stronger necessarily in the field of passports where we are dealing with a right not a privilege as a Court of Appeals has once said for all of these reasons we will not give you an affidavit of the kind requested.

61 Dr. Briehl: I bring this point up because it was brought up in my interview with Mr. Nicholas and it is a question which is unanswered. Unless I have clarification on the method of logic and on the method of reasoning I do not see how I can proceed with the affidavit matter. The specific question which I asked of Mr. Nicholas and I would like an answer from him is this. Inasmuch as several of the allegations antedated 1942 when I was commissioned as a Major, why was I commissioned a Major and subsequently promoted to Lieutenant Colonel if any of these allegations had any significance? On what basis am I during war time as a commissioned officer entrusted with confidential and restricted and classified information and then in peacetime when as a physician I wish to go to a medical conference I am regarded as a security risk and my visit abroad on a medical mission for the welfare of mentally sick people, the mental hygiene problem being the most important problem in America at the present time, am I considered a security risk? Do you wish to answer that question Mr. Nicholas? Can you clarify me as to your sense of values on this point?

Mr. Nicholas: You have asked questions entirely outside the jurisdiction of the Passport Office and I will not attempt to answer them. Should I assume from your statements and the statement by Mr. Boudin that you will not make any statement at the present time either under oath
62 or otherwise as to whether or not you were ever a member of the Communist Party?

Dr. Briehl: Mr. Nicholas you avoid basic truths and though you tell me in your Regulations that you would consider any statement I make when I make a statement that has direct reference to this point you simply tell me "you have not complied with regulations". I do not think this is a fair method of procedure at all. I stand on fundamental facts and you must consider the problem in its entirety. You cannot just stick to one point. You must see the total situation and evaluate things in their proper perspective. You have repeatedly avoided these questions when I have put the questions to you point blank. Now would you give me an answer on this point? What is your method of reasoning? I must understand that because I'm a sensible, intelligent person.

Mr. Nicholas: Dr. Briehl, I am afraid you are avoiding the question yourself and I must assume that you will not answer the question I ask you. Mr. Boudin will you state on the record whether Dr. Briehl will state whether he was, or is now, a member of the Communist Party?

Mr. Boudin: The application for a passport renewal states under oath the reasons for Dr. Briehl's application for the passport renewal and the reasons for his desire to travel abroad. I assume that it is not necessary to state under oath that the same reasons will apply to the year 1956 when similar conventions will be held and that it is essential in his view in the practice of his medicine that he be able to travel to Europe freely without the
63 restrictions imposed by the Regulations. Now, it is our basic view that the practice of medicine must not be confused with political considerations and that there

is one premise here which we accept and which apparently you do not namely, that national security cannot be imperiled and that it could not have been the intention of Congress or the President or even the Secretary of State in enunciating these Regulations to impose political conditions upon a physician who desires to travel to Europe for the purpose stated under oath in the application for a passport and which purposes still remain with respect to the next year. In short, it is inconceivable, logically, factually, morally or legally, that national security should be adversely affected by Dr. Briehl's going to Europe to attend these conventions. On the contrary it is highly consistent with and, in our view, necessary for national security in a larger sense and every other sense that Dr. Briehl and other physicians engaged in this important work of mental health, which is one of the most important things for this country and for the world, that Dr. Briehl be permitted to attend these conventions where he is qualified to appear and to teach people and to learn and to which he has been sent by the most important professional organizations in this country. That is why the only affidavit that you are entitled to is the affidavit which is set forth in the passport application. The only thing under oath that you are entitled to is a passport application or an application for renewal which states why Dr. Briehl wants to go to Europe. If you had any facts to show that his statement was in any respect untrue, and, of course, you do not . . . I assume then it would be up to you to present these facts here but that, as I say, is the only statement under oath to which you are entitled in this situation. Under these circumstances I now come to the answer which I thought we had given you several times before . . . Dr. Briehl will not execute an affidavit of the kind you requested. He will not execute an affidavit with respect to past membership; he will not execute an affidavit with respect to present membership; he will not execute an affidavit with respect to future membership. And that does not apply only to the Communist Party situation, it applies to

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any political activities or associations or beliefs because those are things which we think are irrelevant to the right of travel and particularly irrelevant, in fact, incredibly so, to the right of a physician to travel for the purposes indicated in the application for the passport renewal. Have I answered your question clearly?

Mr. Nicholas: Yes. This is the answer I have been trying to get out of Dr. Briehl . . . that he will not make such an affidavit.

Dr. Briehl: If it is a matter of an affidavit, I will give an affidavit truthfully as to why I am going to Europe.
65 I will substantiate my passport application that I intend to attend medical conferences, that I intend to travel and to see some relatives. That is the sum and substance complete of my purpose and that encompasses my whole point of view. I am willing to attest to that fact. That is the only point that is relevant in relation to my trip.

Mr. Boudin: Mr. Nicholas, we have answered you several times. I think we answered you earlier at the beginning of the hearing when we discussed the whole procedural due process point but at any rate I think you are in agreement.

Mr. Nicholas: I think the record is very clear now on the subject. I just want to advise you that the Department does give weight to affidavits which people submit as to past and present membership in the Communist Party and has issued a number of passports to people on the basis of such affidavits. These cases, of course, don't go to Court and do not come to the attention of Mr. Boudin.

Mr. Boudin: Mr. Nicholas, now you have several requests before you which we have made and perhaps I can put them again. The first is our request for the issuance of a passport now. Can you give us an answer on that?

Mr. Nicholas: I cannot give you an answer at this time.

Mr. Boudin: Mr. Nicholas, I want to have it clear for the record what your responses are to our request. First,
66 you've indicated that we can't have a decision today. Will you tell me when we can have a decision and by whom that decision is going to be made? I refer to your

reference a few minutes ago for the record that a number of other people inside the Department would have to be consulted, so that I could know from a legal point of view and also from a practical point of view where we are going. Would you indicate who it is who is going to make the decision in this case, who will do the consulting, who will be consulted and when we can have a decision.

Dr. Briehl: May I plead with Mr. Nicholas on the basis of my being a physician and I must be back with my patients that this whole matter be expedited. I am of limited time and of means and I hope that he will make every effort in his behalf to give us a decision on this point.

Mr. Nicholas: We will be glad to give you a decision as soon as possible. Certain things are outside of the control of the Passport Office and I can only estimate at the time involved. If the final decision which will go from the Passport Office is adverse, you will then have to take up with the Counsel of the Board of Passport Appeals the date for the hearing. That is entirely outside the jurisdiction of the Passport Office. The Board functions as a part of the State Department under the chairmanship of an Assistant Secretary of State who otherwise has nothing to do with passport matters. I can only suggest that when the final decision of the Passport Office is received, if it is adverse, you have your attorney to get in touch with Mr. Sipes who is Counsel for the Board.

Mr. Boudin: Could you tell us when we'll have a decision from your office.

Mr. Nicholas: No, I cannot tell you at the present time.

Mr. Boudin: Now you have made a reference to the right to appeal to the Board of Passport Appeals, that is you have made that reference on the record but, of course, as we have discussed off the record here and in fairness to both of us, I want to point out this problem that may arise. Section 51.142 points out that at any stage the applicant may be required as a part of his application to subscribe under oath or affirmation to a statement with respect to present or past membership in the Communist Party. See-

tion 51.156 provides it is required that prior to petitioning for an appeal an applicant shall (1) exhaust the administrative remedies available in the Passport Office as set forth in 51.137 and (2) comply with the provisions of 51.142 as a part of his application if deemed necessary by the Passport Office. Now, from a practical point of view you have previously requested, and I presume that was because you in your judgment deemed it necessary although I haven't agreed with that, of course, that Dr. Briehl execute an affidavit. We have stated precisely and unambiguously that we will not execute that affidavit or any other kind of attest oath. This means realistically doesn't it, taking 51.156 and 51.142 that the Board will not entertain any appeal any more than it was willing to do originally in the case of Dr. Nathan where we did not have what this Passport Office called a final decision. In short, I want to ascertain realistically where we go after this Passport Office makes it's decision. Am I not correct?

Mr. Nicholas: This is a matter you had better take up with the Counsel of the Board of Passport Appeals. Section 51.156 is a Regulation of the Board with which the Passport Office has nothing to do. I do not know whether the Board has ever waived the particular regulation and suggest that you get in touch with Mr. Sipes in regard to that matter.

Mr. Bondin: Now just to make it clear, since I do not regard the Passport situation in the Department particularly clear in the light of the decisions when the lines of jurisdiction between one office and another in the Department respecting passports are quite vague. I now state for this record that I request you, Mr. Nicholas, as a representative of the State Department and the Passport Area to make a decision on this case immediately and to make arrangements with the Board of Passport Appeals or the Secretary of State or anybody else in the Department for the immediate hearing of an appeal from your decision, if it is adverse, and by "immediate", I mean not later than this week-end. We are prepared to be here

today, tomorrow, Friday and Saturday but the important thing is to have this case heard by the Board of Pass-
69 port Appeals before Dr. Briehl leaves and he will be leaving right after Labor Day for California. Now I am aware of the fact that you pointed out to us . . . I think on the record . . . that technically it is not necessary for Dr. Briehl to be present. On the other hand we have a right to have him present if we wish to in the hearing of the appeal and it would be my present intention to have him present so that he can state to the Board what his full position is on the subject. I feel that . . . you are the recognized authority in the security field in the Department with whom I have now been dealing for two and one-half years and I, therefore, must request you as a representative of the Department to give us a decision in this matter this week . . . and, of course, a decision in our favor . . . alternatively, if the decision is to be against us, then I want you to make the arrangements for a hearing before the Board of Passport Appeals this week and that is my final request to you, Sir.

Mr. Nicholas: Mr. Boudin, you are asking for something entirely beyond my authority.

Mr. Boudin: Then in order to facilitate the problem of an appeal in view of what I have just read, namely 51.142 and 51.156, I request the Passport Office to withdraw its request for an affidavit of any kind on the part of Dr. Briehl and in that way avoid the problems that may be raised by the Board of Passport Appeals. Since I'm interested in expedition I don't want to find that after your have rendered a decision here, if it is adverse, that
70 we file a petition for appeal with the Board of Passport Appeals and find that it won't hear it. I want this matter cleared and I therefore request that you withdraw your request for an affidavit.

Mr. Nicholas: The Passport Office feels that it was justified in making the request for the affidavit and will not withdraw it.

Mr. Boudin: Will you furnish me with a copy of this transcript?

Mr. Nicholas: If the record can be successfully transcribed you will be permitted to see a copy of the transcript.

Mr. Briehl: I would like an unequivocal answer from Mr. Nicholas why all these delays in obstructing my obtaining a passport other than it is Regulations and must be referred to other Departments. I would like to know why there is this delay.

Mr. Nicholas: We have acted upon your case as promptly as it was possible considering the volume of work and the necessity of obtaining information from other offices. We will be glad to expedite our part of the case as much as possible but we have to deal with perhaps a half million American citizens each year who are applying for passports. We do the best we can with the personnel we have.

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72 **Exhibit 10**

ARTICLE REFERRED TO IN PASSPORT HEARING

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73 ENVIRONMENT AND NEUROSIS

WALTER BRIEHL, M.D.

In terms of etiology we think of neurosis as characterized by fixation points at, and regression to, infantile patterns of behavior because of frustration imposed in early life, especially by the parents, and later by parental substitutes. Freud says that every normal as well as every neurotic person inevitably passes through a neurotic phase during childhood. The neurotic adult is thus characterized quantitatively by the amount of infantilism remaining in his adult ego.

Each of us has a coefficient of neurosis, that is, a point where continued emotional stress and strain will impair our

coordinated, smooth functioning. Ferenczi, Freud's earliest collaborator and colleague, says: "According to the psychoanalytic view no one is completely secure against the too powerful or too prolonged emotional strain of shock, the only significance of temperament being that the individual who is severely taxed from birth is damaged by lesser, and the more robustly constituted by greater shock."

Assuming in a given case, that there are no marked constitutional factors, or better, where none seem to exist, what are the environmental forces that make for normal or neurotic behaviour? *In the very early years of life* such forces come exclusively from the parents—there are only two of them—*love and frustration.* They are of vital importance in the development of the child and on their interplay and regulation depends whether the child shall develop normally or with a neurosis or neurotic disposition.

A new born child is an absolutely helpless creature. It can move its extremities but it cannot change its location in space. It can eat but its food must be placed within the confines of its mouth. In this condition of helplessness, any frustration in the form of lack of attention, in the matter of nourishment or hygiene, might have fatal consequences.

But as weeks and months advance the infant becomes less helpless biologically and parental frustrations begin. One of the first of these frustrations is that a two o'clock in the morning feeding is discontinued if the child is thriving. It is deprived of food for a period of 7 to 8 hours at night and the daily intervals are also increased.

Why does the child accept such frustrations at all? Because it wishes to retain the love and affection of its parents; hence it submits to being civilized and socialized—to "growing up," until it is able to function as an adult itself. Thus we see that the ideal parent is the one who, by balancing love and frustration, really weans the child away from parental dependence so that it can function in the world. The paternal and maternal instinct not only implies "We love you, we want you," it also implies "We will provide

for you." If these two basic requirements are not met, there is a problem even before the child is born.

The love-frustration mechanism between parent and child —the mechanism which helps the child grow up into normal manhood or womanhood—can operate smoothly to his end only when the child is wanted and when there is a favorable social and economic and educational atmosphere for the child to grow up in. The first point implies that no child need be born to parents who do not want to have a child. Knowledge of birth control and a conscience free of guilt for its practice, alone can guarantee that the parents will love the coming child. This does not mean that unwanted children are not loved. It does mean, however, that no conflict in relation to the child's existence will have to be repressed before it can be loved. The second point dealing with a favorable environment implies namely that the child should be born in a home free of undue stress and strain, a home where fear and worry and insecurity are minimized. The mental health of the parents is not less important than their physical health. The home should be a fit place of habitation with ample light and air and a room for the child, rather than a crib in the room of the parents where it witnesses and reacts with fear and anxiety or with confusion to the sexual relation of the parents.

Today we live in a world which essentially rejects the individual. This rejection manifests itself in the form of unemployment; in the form of not providing him with basic physical and health necessities when he is unemployed; and in the form of not giving him the opportunity to develop and live a full life, which, among other things, means the opportunity to marry and to raise a family which will live in at least minimum security.

Earlier we pointed out the love-frustration mechanism between parent and child which is the factor bringing about the child's development from the infantile, narcissistic, social ego to the adult social ego. These frustrations which were balanced with love, kindness and understanding on

the part of the parents, were both useful and necessary. They might be called constructive frustrations.

But unemployment, lack of educational opportunity for development, absence of basic physical needs of food and clothing, are essentially destructive frustrations and do not lead to integration but to disintegration and dissociation of the personality. It is true that a person with a relatively resistant psychic structure can still preserve his mental health under extremely adverse circumstances. But a less well integrated personality will fail to preserve itself owing to the dissipation of energy consumed in internal conflicts.

All persons are liable to suffer a nervous breakdown if emotional strain is carried beyond a certain degree, this degree varying from one person to another. In war, for instance, only men who seem normal are selected as soldiers. Yet under stress of fighting and battle, the threshold of resistance is exceeded and large numbers of men are affected with neurosis, who under conditions of peace would have remained well. Civilians are likewise affected in the tension and stress of war and the weaker ones succumb under these conditions.

In today's changing world, too, the individual lives under a condition of stress and strain. There is a
74 parallel between the way such unfavorable conditions influence and condition neurosis and the way they influence physical health. In medicine, people may be classified into three groups from the point of view of health:

1. Those who are healthy even when conditions around them are unfavorable.

2. Those who are healthy when conditions around them are favorable.

3. Those who are ill even when conditions are favorable.

When conditions become more unfavorable we know that fewer remain in the first group of health. Those in the second group do not remain healthy. Those in the third group become more ill. This is just as true of mental health. There are fewer in the first group of those who can stave

off neurosis under unfavorable conditions. Those in the second group, healthy when conditions are favorable, become borderline or actual neurotics; while those in the third group regress deeper into their neuroses.

What is the ultimate result of the friction, frustration and rejection of the individual in this social environment? The individual lives in a continual state of conflict. His reaction to this conflict can be a normal one or a neurotic one. In the former case, the normal reaction, the frustrated ego will try either to dominate or master the difficulty, or else seek other outlets for gratification and expression; that is, he will renounce the object and tolerate the frustration. But what is the individual to do when he has already tried to master a situation which cannot be mastered; for example, to obtain employment when there are no jobs? Suppose he tolerates the frustration and receives relief—Where then is the ego gratification, which is a requisite for a unified and integrated personality?

Moving in this vicious circle of frustration and rejection there is but one avenue of escape—*regression*, which means either criminal behavior or neurotic behavior. From psychoanalytic research we know that the unconscious of a criminal, a neurotic and a normal person is practically identical and that this unconscious is anti-social in character. The criminal lives out his anti-social instincts in anti-social acts of delinquency and crime. The neurotic however, because of a super-morality, emanating from his super-ego, represses his anti-social instincts both in thought and in action. Paralyzed by guilt and anxiety he cannot function efficiently. The normal person is able to control his anti-social impulses and sublimate them for useful ends.

With the lack of opportunity in employment and self-development, the criminal ego, which suffers from a lack of parental love and super-ego, now reactivates and reverts to its anti-social impulses.

With the same lack of opportunity in employment and development the neurotic ego also reactivates and reverts

to infantile patterns, chief of which is a strong dependent attachment to the parents. The world is too unkind and brutal, too frustrating and rejecting. The neurotic develops a greater feeling of anxiety and insecurity, which already exists to a large degree because of unresolved infantile problems. He is less apt to regress, to the degree that the world accepts him and makes conditions of living bearable; but in the absence of a kind environment he will, either in reality or phantasy, return to the life of his childhood and infancy when his actual mother fretted and worried about his welfare. The neurotic mother, anxious and worrying about a child, fills it with fear about the world—and when the child grows into it, all too often he has such fears confirmed rather than dispelled.

The objective in therapy of a neurosis is to reduce and wean away the libido of the patient from infantile protection love objects—the parents—to objective relationships in the world. This process is facilitated and aided to the extent that the individual finds a receptive world and complicated to a degree that the individual finds a hostile, rejective world.

It has been my experience frequently in working with patients at a mental hygiene clinic who come, not with symptoms but as they say, with "troubles," that therapeutic work runs into an impasse because of environmental limitations. Idleness breeds deterioration and this factor handicaps therapy tremendously. As the building stones of a neurotic personality are loosened, a synthesis must take place, that is, libido, which has been bound in neurotic patterns and which is now loose must be utilized and sublimated into channels which will give the individual some form of gratification and reward. Employment is especially conducive to such sublimation and solidification of the new ego. Without it the new ego dangles and gropes hopelessly to find new objects, all the time bordering dangerously on relapse and regression to previous patterns and infantile objects.

If a neurosis is the sole obstacle between an individual and happiness then our sole task is to resolve his neurosis. But if there is a second obstacle, an environment with contradictions and evils which make the level of happiness low for even a normal person, then society owes just as much attention to this aspect of the problem.

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76 **Exhibit 11**

Filed Feb. 1, 1956

August 31st, 1955

John W. Sipes, Esq.
Board of Passport Appeals
Department of State
Washington, D. C.

Re: Passport Application—Dr. Walter Briehl

Dear Mr. Sipes:

In accordance with your suggestion, this is written to confirm my request, made orally to you yesterday over the telephone.

I advised you that I had appeared at a Hearing in the Passport Office, with my client, Dr. Walter Briehl; that Dr. Briehl's case had been pending for many months and that it was necessary that we should have a final hearing before the Passport Office, prior to Dr. Briehl's departure from the East, immediately after Labor Day.

I advised you, further, that Dr. Briehl had declined to execute the affidavit requested by Mr. Nicholas, and I inquired as to whether or not this refusal would affect his right to file a petition and to be heard by the Board. I did not receive a definite reply on this point from you.

Dr. Briehl is a very busy psychiatrist, who resides in California and must return to his practice, within a day or day after Labor Day.

He wishes to be present at the Hearing before the Board, but if the Board Hearing is not held immediately, it will be difficult, if not impossible, for Dr. Briehl to appear personally at such Hearing.

Under these circumstances, I requested yesterday, and repeat my request, that the Department make appropriate arrangments to render a decision, through its Passport Office, and to have this case heard by the Board of Passport Appeals, not later than next Tuesday.

May I have your immediate response.

Very truly yours,

LEONARD B. BOUDIN
for RABINOWITZ & BOUDIN

lbb/fal
SPECIAL DELIVERY

77

Exhibit 12

Special Delivery August 31st, 1955

Filed Feb. 1, 1956

Mr. Ashley Nicholas
Deputy Director, Passport Office
Winder Building
Washington, D. C.

Re: Passport Application, Dr. Walter Briehl

Dear Mr. Nicholas:

Dr. Briehl has advised me that, after talking to Mr. Franz Mathes, he made arrangements with a Recording Company to have records of yesterday's Hearing ~~taken~~ down on a tape recorder. Nevertheless this agreement was countermanded by you in the afternoon, when the Recording Company representative arrived.

You will realize that the record is the best evidence of the hearing and that we, therefore, are entitled either to

the records now in your possession or to a tape recording of them.

I must therefore ask you to reconsider and to advise me that this procedure is acceptable to you. However, in the event that you should decline to follow this procedure, then I, of course, shall expect you to send me a stenographic record made from the recording.

Subsequently, I shall take such appropriate action in Court as I deem advisable to secure the recording itself.

I also call your attention to the necessary for speed in this case and request that a decision be made by your office, before the week-end, so that the Board of Passport Appeals may have the opportunity to hear this case before Dr. Briehl leaves for the West.

Very truly yours,

LEONARD B. BOUDIN
for RABINOWITZ & BOUDIN

lbb/fal

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78 **Exhibit 13**

Filed Feb. 1, 1956

DEPARTMENT OF STATE
WASHINGTON

September 2, 1955

Dear Mr. Boudin:

I have your letter of August 31, 1955 concerning the passport application of Dr. Walter Briehl.

It is understood that you appeared with your client, Dr. Briehl, at a hearing in the Passport Office on August 30, 1955. It is further understood that Dr. Briehl refused to execute an affidavit as to present or past membership in the Communist Party, having been requested to do so by the Passport Office. The Board has not been advised of

any further processing of this case under Section 51.137 of the Passport Regulations.

In these circumstances, the Board could not entertain an appeal from Dr. Briehl at this time. Your attention is invited to Sections 51.138 and 51.142 (22 CFR) of the Passport Regulations, and Sections 51.156 (2) and 51.147 (22 CFR) of the Rules of the Board.

Sincerely yours,

JOHN W. SIPES
John W. Sipes
Counsel
Board of Passport Appeals

LEONARD B. BOUDIN, ESQUIRE
RABINOWITZ & BOUDIN
Attorneys at Law
25 Broad Street
New York 4, New York

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79 **Exhibit 14**

Filed Feb. 1, 1956

DEPARTMENT OF STATE
WASHINGTON

Sep. 16, 1955

In reply refer to
F 130-Briehl, Walter

Mr. Leonard B. Boudin
Rabinowitz & Boudin
25 Broad Street
New York 4, New York

Dear Mr. Boudin:

Reference is made to your letter of September 12, 1955 requesting a decision in the case of Dr. Walter Briehl.

You will recall that during the recent informal hearing in which you represented Dr. Briehl, he refused to explain

or deny the allegations concerning him. He also refused to submit an affidavit setting forth whether he was or ever had been a member of the Communist Party.

In view of the above, the Department knows of no further action which it can appropriately take in the case of Dr. Briehl.

Sincerely,

FRANCES G. KNIGHT
Frances G. Knight
Director, Passport Office

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80 **Exhibit 15**

Filed Feb. 1, 1956

September 19, 1956

John W. Sipes
Counsel
Board of Passport Appeals
Department of State
Washington, D. C.

Re: Dr. Walter Briehl

Dear Mr. Sipes:

I have your letter of September 2, 1955 regarding the passport application of Dr. Walter Briehl.

Your letter is somewhat obscure in its reference to the passport regulations and the rules of the Board. Do I understand correctly that there are two conditions to an appeal: first that the request of affidavit be executed and second that the passport office describe its decision as a final one?

May I have your immediate reply to this inquiry.

Very truly yours,

LEONARD B. BOUDIN

LBB:a

81 **Exhibit 16**

Filed Feb. 1, 1956

September 20, 1955

John W. Sipes, Esq.
Counsel
Board of Passport Appeals
Department of State
Washington, D. C.

Dear Mr. Sipes:

I enclose a letter received today from the Director of the Passport Office declining to render a decision in the case of Dr. Walter Briehl.

I assume from your letter of September 2, and our correspondence in other cases that the Board will not entertain an appeal from Miss Knight's decision.

Will you be good enough to advise me whether I am correct. Should I be in error on this point, we shall appeal immediately to the Board.

Very truly yours,

LEONARD B. BOUDIN

LBB:a
enclosure.

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82 **Exhibit 17**

Filed Feb. 1, 1956

September 27, 1955

John W. Sipes, Esq.
Counsel, Board of Passport Appeals
Department of State
Washington, D. C.

Dear Mr. Sipes:

I have not received any reply to my letter of September 20, in which I inquired as to whether the Board would

entertain an appeal in the case of Dr. Walter Briehl where the Passport Office declined to render a decision because of his refusal to execute an affidavit under section 51.142. I should appreciate receiving your response by return mail.

Sincerely yours,

LEONARD B. BOUDIN

LBB:J

83

Exhibit 18

Filed Feb. 1, 1956

DEPARTMENT OF STATE
WASHINGTON

September 29, 1955

Dear Mr. Boudin:

I have your letters of September 19, 20, and 27, 1955, concerning whether the Board of Passport Appeals will entertain an appeal in the case of Dr. Walter Briehl.

As you are fully aware, the Board of Passport Appeals was established (22 C.F.R. 81.139) to act on appeals from decisions adverse to the passport applicant (22 C.F.R. 51.138), pursuant to the provisions of Sections 51.135 or 51.136 of the Passport Regulations. The Board is unaware of such an adverse decision in Dr. Briehl's case.

Sincerely yours,

JOHN W. SIPES
John W. Sipes
Counsel
Board of Passport Appeals

Leonard B. Boudin, Esquire
Rabinowitz & Boudin
Attorneys at Law
25 Broad Street
New York 4, New York

84 Filed Feb. 23, 1956

Cross-Motion for Summary Judgment

Comes now the defendant and by his attorney, the United States Attorney for the District of Columbia, moves the Court to order summary judgment in his favor upon the ground that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law.

Attached hereto and made a part hereof is the affidavit of Frances G. Knight, Director of the Passport Office of the Department of State.

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120 Filed Feb. 23, 1956

Affidavit of Frances G. Knight

I, Frances G. Knight, being duly sworn, depose and say that:

(1) I am the Director of the Passport Office of the Department of State and am charged by the Secretary of State with the responsibility for determining the action to be taken in the first instance on all passport applications.

(2) The plaintiff was issued a passport on May 6, 1953.

(3) Subsequently, upon the expiration of the passport, two years later, the plaintiff requested a renewal thereof.

(4) On May 13, 1955, I informed the plaintiff in writing that his request for renewal had been considered under the Supplement to Passport Regulations, Section 51.135 of which provides for the refusal of passports to persons in the following categories:

"(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not

otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party; and

"(b) persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement."

121

"(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and willfully, of advancing the movement."

In this connection, Dr. Briehl was asked to furnish an affidavit setting forth whether he was then or ever had been a Communist and to explain his connections with the Bookshop Association, St. Louis, Missouri; the Civil Rights Congress; the Hollywood Arts, Sciences and Professions Council; and the Los Angeles Committee for the Protection of the Foreign Born. A copy of my letter is attached as Exhibit A.

(5) On May 20, 1955, the plaintiff, through his attorney, Daniel G. Marshall, replied to the Department in writing that he refused to submit the affidavit requested.

(6) On May 31, 1955, I sent Dr. Briehl a letter, tentatively disapproving his application for renewal of his passport on the ground that further passport facilities were precluded under the provisions of Section 51.135 of the Passport Regulations, and informing him, in accordance with the Department's practice, of the reasons for the disapproval of his application insofar as the security

regulations would permit. He was informed of his right to appear before a hearing officer of the Passport
122 Office and to be represented by counsel. He was told further that at the hearing he would be required to submit a sworn statement as to whether he was then or ever had been a Communist. A copy of this letter is attached as Exhibit B.

(7) Subsequently, on August 30, 1955, an informal hearing was held in the Passport Office, at which Dr. Briehl and his attorney, Leonard Boudin, appeared. Dr. Briehl continued to refuse to execute the affidavit requested. A transcript of the hearing is attached as Exhibit C.

(8) On September 16, 1955, I informed Mr. Boudin in writing that, in view of Dr. Briehl's refusal to submit an affidavit concerning present or former membership in the Communist Party, the Department knew of no further action which it could appropriately take in his case. A copy of this letter is attached as Exhibit D.

(9) The reasons why I deemed it necessary, and still deem it necessary, to require the plaintiff to execute, as a part of his application, an oath or affirmation as to present and past membership in the Communist Party are contained in reports of a confidential character furnished the Department by another agency of the Government indicating the following concerning the plaintiff:

He was in 1945 a member of the Los Angeles County Communist Party; he held Communist Party meetings in 1950 in his medical offices; he contributed in 1936 and 1941 articles to the publication "Social Work Today", which has been characterized as a Communist publication and he contributed $1,000 in 1949 to the Civil Rights Con-
gress Bail Fund to be used in raising bail on behalf
123 of the convicted Communist leaders in New York City. In addition, these reports indicate that as of May, 1951, he was a member of the Hollywood Arts, Sciences and Professions Council, the Southern California

Chapter of the National Council of Arts, Sciences and Professions, an organization cited by the Attorney General as Communist; that he had contact with the American Committee for the Protection of the Foreign Born, an organization cited by the Attorney General as Communist; and that he attended in 1945, while an officer in the Army, meetings of the Bookshop Association, St. Louis, Missouri, which is reported to have been dominated by the Communist Party in the St. Louis area.

FRANCES G. KNIGHT
Frances G. Knight

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86 Filed Feb. 23, 1956

Exhibit B

May 31, 1955

In reply refer to
F130-Briehl, Walter

Dr. Walter Briehl,
2060 North Vine Street,
Los Angeles, 28, California.

Dear Dr. Briehl:

The Department has received a letter dated May 20, 1955 from your attorney in which he states that you decline to furnish the Department with the affidavit which was requested in the Department's letter to you dated May 13, 1955.

I regret to inform you that after careful consideration of your application for the renewal of passport facilities, the Department of State is obliged to disapprove your request tentatively on the ground that the granting of such further passport facilities is precluded under the provisions of Section 51.135 of Title 22 of the Code of

Federal Regulations. A copy of the pertinent Regulations is enclosed for your information.

In cases coming within the purview of the Regulations above referred to, it is the practice of the Department to inform the applicant of the reasons for the disapproval of his request for passport facilities insofar as the security regulations will permit. In your case it has been alleged that you were a Communist. Specifically it is alleged that you were a member of the Los Angeles County Communist Party; that you were a member of the Bookshop Association, St. Louis, Missouri; that you held Communist Party meetings; that in 1936 and 1941 you contributed articles to the Communist Publication "Social Work Today"; that in 1939, 1940 and 1941 you were a sponsor to raise funds for veterans of the Abraham Lincoln Brigade in calling on the President of the United States by a petition to defend the rights of the Communist Party and its members; that you contributed to the Civil Rights Congress bail fund to be used in raising bail on behalf of convicted Communist leaders in New York City; that you were a member of the Hollywood Arts, Sciences and Professions Council and a contact of the Los
86a Angeles Committee for Protection of Foreign Born and a contact of the Freedom Stage, Incorporated.

Under Section 51.137 of the Regulations you may present your case and all relevant information informally to the Passport Office. If you desire to take advantage of this provision you may appear before a hearing officer of the Passport Office and you may be represented by counsel. In such case, you will be required to submit a sworn statement as to whether you are now or ever have been a Communist.

If you do not desire a hearing, the Department will give consideration to any written statement under oath which you may desire to submit concerning the matter, provided that you include therein a statement as to whether you are now or ever have been a Communist.

You are assured that any information or evidence which you may supply will receive most careful consideration and that every effort will be made to act upon your application promptly and justly. The Department desires to emphasize that the passport records are confidential Government records and any information which you may submit or which may be received from other sources in connection with your application will not be made known to the public or to any unauthorized person unless you release it. The Department reserves the right to disclose factual information to supplement or correct any statement which a passport applicant may release for publication concerning the reasons why he was denied a passport or the Department's action in his case.

If a reply to this letter is not received within thirty days, it will be assumed that you do not wish to have your case reconsidered at this time.

Sincerely yours,

For the Secretary of State:
FRANCES G. KNIGHT
Director, Passport Office.

The Deputy Clerk: Briehl v. Dulles.

Mr. Boudin: It is in my mind to rest upon the argument previously made in the Kent case, since the issues are essentially the same. I don't know whether Your Honor has already read the papers as well.

The Court: I have read the papers.

Mr. Boudin: Does Your Honor see a distinction?

The Court: I do not.

Mr. Boudin: One would have to argue in order to make a distinction, I suppose, basically that the legitimacy of travel for the purpose of attending a psychiatric and

psychoanalytic congress is greater than the right to travel for the purpose of painting.

As Your Honor knows, Dr. Briehl is a well known, internationally known psychiatrist who attended the psychoanalytical conference in 1953 in Europe, was denied the opportunity by the State Department in 1955 to do so, and to attend them in 1956 on the declination to execute as a matter of fundamental principle this affidavit as demanded.

I take it from Your Honor's attitude and expression that your views will be the same in the Briehl case.

The Court: I think so. I will make the same ruling in the Briehl case.

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74 Filed April 12, 1956

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5441-55

ROCKWELL KENT, *Plaintiff*

v.

JOHN FOSTER DULLES, *Defendant*

Washington, D. C.
March 28, 1956

85 **Opinion of the Court**

The Court: (McGarraghy, J.) I am prepared to rule, to express my view on the case. In my opinion the passport regulations in question are valid and reasonable regulations.

Further, in my opinion the plaintiff is not entitled to relief because he fails first to show he has exhausted his administrative remedies, and, second, because he fails to qualify for a passport in that he has failed to make the

non-Communist affidavit which the valid regulations require, and therefore I will deny the motion for a preliminary injunction and will deny the plaintiff's motion for summary judgment and grant the Government's motion for summary judgment.

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124 Filed Mar. 29, 1956

Order

Upon consideration of plaintiff's motions for preliminary injunction and for summary judgment, and of defendant's cross-motion for summary judgment, and it appearing to the Court that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law, it is by the Court this 29th day of March 1956

ORDERED that the defendant's cross-motion for summary judgment be and the same hereby is granted, and it is

FURTHER ORDERED that the plaintiff's motion for summary judgment be and the same hereby is denied, and it is

FURTHER ORDERED that the plaintiff's motion for preliminary injunction be and the same hereby is denied, and it is

FURTHER ORDERED that the complaint herein be and the same hereby is dismissed.

JOSEPH C. MCGARRAGHY
Judge

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125 Filed Mar. 30, 1956

Notice of Appeal

Notice is hereby given this 30th day of March, 1956, that the plaintiff, Walter Briehl, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 29th day of March, 1956, in favor of the defendant, John Foster Dulles, against said plaintiff.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13317

WALTER BRIEHL, APPELLANT

v.

JOHN FOSTER DULLES, Secretary of State, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 27, 1957

Mr. Leonard B. Boudin, with whom *Messrs. David Rein* and *Joseph Forer* were on the brief, for appellant.

Mr. B. Jenkins Middleton, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Mr. Oliver Gasch*, United States Attorney, and *Mr. Paul A. Sweeney*, Attorney, Department of Justice, were on the brief, for appellee. *Mr. Lewis Carroll*, Assistant United States Attorney, also entered an appearance for appellee.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER and BASTIAN, Circuit Judges, sitting *en banc*.

EDGERTON, *Chief Judge*, announced the judgment and division of the court as follows:

The judgment of the District Court, granting the Secretary's motion for summary judgment, is affirmed.

Judges Prettyman, Miller, Washington, Danaher and Bastian vote to affirm. Judges Edgerton and Bazelon vote to reverse. Judge Fahy votes to remand to the District Court with instructions to remand to the Secretary. Judge Burger took no part in the consideration or decision of this case.

Judge Prettyman files an opinion in which Judges Miller, Danaher and Bastian concur. Judge Washington files an opinion concurring in the result reached by Judges Prettyman, Miller, Danaher and Bastian, p. 29. Judge Bazelon files a dissenting opinion in which Judge Edgerton concurs. p. 34. Judge Edgerton also files a separate dissent. p. 70. Judge Fahy files a dissenting opinion. p. 71.

PRETTYMAN, *Circuit Judge*, with whom WILBUR K. MILLER, DANAHER and BASTIAN, *Circuit Judges*, concur: Appellant, Dr. Walter Briehl, applied in April, 1955, to the Department of State for renewal of a passport, stating his desire to attend an international psychoanalytic congress in Geneva and a World Mental Health Organization Congress in Istanbul. He was and is engaged in the practice of medicine, specializing in psychiatry. In prior years he had attended international meetings in this field. The Director of the Passport Office wrote him that "it would be helpful to the Department if you would furnish an affidavit setting forth whether you are now or ever have been a Communist, and explain your connections with" certain named organizations. Dr. Briehl's attorney replied, saying in part:

> "My clients refuse to submit the affidavits your letters request. Your demands and the vague and formless standards of the passport regulations under which you purport to act are palpable violations of their Constitutional rights, including, but not limited to, the First, Fifth, Ninth and Tenth Amendments."

The attorney described Dr. and Mrs. Briehl's professional interests and concluded by saying: "Demand is

hereby made that passports as applied for by them be issued forthwith."

Thereupon the Director of the Passport Office wrote Dr. Briehl, saying in part:

> "I regret to inform you that after careful consideration of your application for the renewal of passport facilities, the Department of State is obliged to disapprove your request tentatively on the ground that the granting of such further passport facilities is precluded under the provisions of Section 51.135 of Title 22 of the Code of Federal Regulations. A copy of the pertinent Regulations is enclosed for your information.
>
> "In cases coming within the purview of the Regulations above referred to, it is the practice of the Department to inform the applicant of the reasons for the disapproval of his request for passport facilities insofar as the security regulations will permit. In your case it has been alleged that you were a Communist."

Dr. Briehl's attorney replied in part:

> "[My clients] wish you to be advised that they do not choose to offer any evidence in support of their applications for passports unless and until they are confronted with the informers your letter states have furnished you with proof that they have been, are, or intend to engage in acts contrary to the national interests of this country."

Thereafter the attorney wrote several times demanding the issuance of the passports and "an evidentiary hearing". An "informal" hearing was arranged. Dr. Briehl, his attorney, and two representatives of the State Department attended. The attorney made an extended statement, in the course of which he recounted the correspondence, described Dr. Briehl's purposes in seeking to go abroad, and made three points as follows:

> "Our first point, therefore, is that medicine has nothing to do with politics and you may not introduce and confuse the issue of his right to practice medicine and his right to study, and his right to

participate in conferences by injecting this issue of politics in connection with his travel abroad. When a physician has a legitimate purpose in going abroad as was stated here, all issues of political affiliation, past or present, definite or indefinite, good or bad, are irrelevant. That will be our first point. * * * My second point is that everyone has the right to travel regardless of political considerations. * * * Now we turn to the third point. * * * that you confront us with the evidence against Dr. Briehl. * * * It is up to the Department to support those allegations by evidence and witnesses which we can examine and confront. * * * [W]e have a right to what the courts have now called a quasijudicial hearing, * * *; and * * * it is the Department's job to prove not only the facts with respect to each of these allegations but it is the Department's job to prove wherein each of these activities was wrong and wherein the activities were in violation of the laws of the United States."

The attorney later said:

"* * * Dr. Briehl will not execute an affidavit of the kind you requested. He will not execute an affidavit with respect to past membership; he will not execute an affidavit with respect to present membership; he will not execute an affidavit with respect to future membership. And that does not apply only to the Communist Party situation, it applies to any political activities or associations or beliefs because those are things which we think are irrelevant to the right of travel and particularly irrelevant, in fact, incredibly so, to the right of a physician to travel for the purposes indicated in the application for the passport renewal."

In response to a letter from Dr. Briehl's attorney, counsel for the Board of Passport Appeals replied:

"It is understood that you appeared with your client, Dr. Briehl, at a hearing in the Passport Office on August 30, 1955. It is further understood that Dr. Briehl refused to execute an affidavit as to present or past membership in the Communist Party, having been requested to do so by the Passport Office

The Board has not been advised of any further processing of this case under Section 51.137 of the Passport Regulations.

"In these circumstances, the Board could not entertain an appeal from Dr. Briehl at this time. Your attention is invited to Sections 51.138 and 51.142 (22 CFR) of the Passport Regulations, and Sections 51.156(2) and 51.147 (22 CFR) of the Rules of the Board."

And a few days later the Passport Office wrote:

"You will recall that during the recent informal hearing in which you represented Dr. Briehl, he refused to explain or deny the allegations concerning him. He also refused to submit an affidavit setting forth whether he was or ever had been a member of the Communist Party.

"In view of the above, the Department knows of no further action which it can appropriately take in the case of Dr. Briehl."

Dr. Briehl filed a civil action in the District Court, naming the Secretary of State as defendant. He prayed for a judgment decreeing that he is entitled to a passport under the statutes, that the passport regulations of the Secretary of State are invalid and illegal; and that the refusal to renew the passport was in violation of his (Briehl's) rights under the Passport Act of 1926, the Constitution of the United States and the Declaration of Human Rights of the United Nations; enjoining the Secretary from continuing to deny the passport; and directing him to renew the passport.

The Secretary answered, and a motion and a cross motion for summary judgment were made, with supporting affidavits and exhibits. The court rendered a brief opinion, denied the plaintiff's motion, and granted the motion of the Secretary.

In this court Dr. Briehl divides his argument into four main points:

1. Appellant's constitutional right to travel could not be conditioned upon his execution of a non-

Communist affidavit or compliance with any other political test.

2. Appellee's regulations deprive appellant of procedural due process and the quasi-judicial hearing to which he is entitled under the recent decisions of this Court.

3. The regulations are not authorized by statute, they conflict with the will of Congress and were invalidly promulgated.

4. The Secretary has not made out a case against appellant, even under the Regulations.

The arguments thus advanced involve consideration of six basic subjects.

I

The nature of the Communist movement. Dr. Brichl's underlying premise, as shown by the statements we have quoted, is that Communist membership or affiliation is a matter of politics, an issue of political affiliation, a political consideration, a political test, and thus is subject to the same rules which apply to political beliefs generally. But it is not so. The Communist organization and program have long since passed beyond the area of mere politics and political opinion. All three branches of the Federal Government—the executive, the legislature, and the judiciary—have declared unequivocally that the Communist movement today is an international conspiracy aimed at world domination and a threat to the internal security of this country. The foreign policy and a large part of the fiscal policy of the Government are based upon that proposition.

The Congress declared in 1950:

> "There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the

world through the medium of a world-wide Communist organization."[1]

President Truman declared in 1950:[2]

"WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

"WHEREAS, if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to choose those who conduct their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; * * *."

In his Inaugural Address of January, 1957, President Eisenhower said:

"The divisive force is international communism and the power that it controls.

"The designs of that power, dark in purpose, are clear in practice. It strives to seal forever the fate of those it has enslaved. It strives to break the ties that unite the free. And it strives to capture—to exploit for its own greater power—all forces of change in the world, especially the needs of the hungry and the hopes of the oppressed."[3]

In his State of the Union speech on January 10, 1957, the President had said: "The existence of a strongly armed imperialistic dictatorship poses a continuing threat to the free world's and thus to our own Nation's secu-

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[1] 64 STAT. 987, 50 U.S.C.A. § 781(1).

[2] Proc. No. 2914, 64 STAT. A454, 50 U.S.C.A. App. 6 (1951).

[3] 103 CONG. REC. 729 (daily ed. Jan. 21, 1957).

rity and peace."[4] He referred to "Communist persecution", and to "Soviet aggression".[5]

The Supreme Court has held valid and sufficient the findings of Congress[6] and the findings of a jury[7] to the same import as the foregoing declarations. In *Galvan* v. *Press* the Court quoted the above-quoted congressional finding and said: "Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress."[8] In *American Communications Ass'n* v. *Douds*[9] the Court, balancing the interest of the public against a partial abridgement of speech, upheld the statutory requirement that a person must swear he is not a member of the Communist Party before he can avail himself or his organization of the processes of the Labor Board.[10]

There exists in some quarters a dogged insistence that the Communist movement be treated as any other political organization. It is as though one argued that, since opiates and aspirin both possess medicinal properties, they must be subjected to the same permissions and restrictions. The fact is that opiates are to be and are regulated because of their own peculiar characteristics. And so is the Communist movement and its affiliates. It

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[4] 103 CONG. REC. 389 (daily ed. Jan. 10, 1957).

[5] *Id.* at 390.

[6] Galvan v. Press, 347 U.S. 522, 98 L.Ed. 911, 74 S.Ct. 737 (1954).

[7] Dennis v. United States, 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857 (1951).

[8] *Supra* note 6, 347 U.S. at 529.

[9] 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674 (1950).

[10] And see the opinion of Mr. Justice Jackson in American Communications Ass'n v. Douds, *id.*, 339 U.S. at 424 *et seq.*, with its accumulation of underlying data.

would be inexcusably naive for any court to declare in the present state of the world that adherence to the Communist cause is a mere matter of politics or political opinion. We shall treat the Communist movement according to what the Congress, the President, and the Supreme Court have declared it to be.

II

The power of government in foreign affairs. Whatever may be the dispute—and it has been extended and intense—as to the division of this power as between the President and the Congress, it seems settled beyond dispute that those two branches between them possess the totality of the power. In a long line of cases, beginning perhaps with *Foster* v. *Neilson*[11] and extending down to *United States* v. *Curtiss-Wright Corp.*,[12] *United States* v. *Belmont*,[13] *Chicago & Southern Air Lines* v. *Waterman Corp*,[14] and *Ludecke* v. *Watkins*,[15] the Supreme Court has laid down the rule that foreign affairs and decisions upon foreign policy are political matters entrusted by the Constitution to the political departments of the Government, and that the judiciary has no part in them. Mr. Justice Jackson, writing for the Court in the *Chicago & Southern Air Lines* case, stated the proposition in succinct, quotable terms. He wrote:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has avail-

[11] 27 U.S. (2 Pet.) 253, 7 L.Ed. 415 (1829).

[12] 299 U.S. 304, 81 L.Ed. 255, 57 S.Ct. 216 (1936).

[13] 301 U.S. 324, 81 L.Ed. 1134, 57 S.Ct. 758 (1937). *Belmont* is discussed at length and with approval in United States v. Pink, 315 U.S. 203, 86 L.Ed. 796, 62 S.Ct. 552 (1942).

[14] 333 U.S. 103, 92 L.Ed. 568, 68 S.Ct. 431 (1948).

[15] 335 U.S. 160, 92 L.Ed. 1881, 68 S.Ct. 1429 (1948).

able intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." [16]

The range of permissible judicial action in the case at bar is narrowed also by the fact that the Secretary is acting in the context of a national emergency. Only the President may declare an emergency; he has done so.[17] The existence of an emergency indisputably enhances both executive and legislative power.[18] The Secretary has acted pursuant to two acts of Congress,[19] which not only recognize the administrative function of the executive in this area but also delegate to the execu-

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[16] *Supra*, 333 U.S. at 111. Extensive discussions of the doctrines underlying the powers of the President are in the opinions in Youngstown Co. v. Sawyer, 343 U.S. 579, 96 L.Ed. 1153, 72 S.Ct. 863 (1952).

[17] Proc. No. 2914, *supra* note 2.

[18] Hirabayashi v. United States, 320 U.S. 81, 87 L.Ed. 1774, 63 S.Ct. 1375 (1943).

[19] 44 STAT. 887 (1926), 22 U.S.C.A. § 211a; 66 STAT. 190 (1952), 8 U.S.C.A. § 1185.

tive any rule-making power it may have lacked. Thus the Secretary's acts are buttressed by the sovereign power to defend the nation.

There are of course in any government formed upon a constitution residual areas within which the judicial branch may act in respect to a power even so unfettered as is the executive power in foreign affairs. If the President were in gross defiance of constitutional limitations, or perhaps even of congressional prohibitions, the judiciary might act. The Supreme Court has also held[20] that, where the Secretary refused to issue a passport solely upon an erroneous finding of mixed law and fact (in that case citizenship), a decree precluding his denial on that ground could issue.

It must be kept in mind that the power of the judiciary to inquire is vastly different from its power to act. A court often has jurisdiction to determine whether it has jurisdiction. The books are full of cases in which the courts have examined with meticulous care complaints alleging invalidity of executive action in foreign affairs. But seldom if ever have the courts found grounds to impose upon such executive action their own ideas of propriety or wisdom. So in the case at bar it is not suggested that the court could not entertain a complaint against the Secretary of State alleging the illegality of his action. The point is that having examined the allegations the court is without power to act save in a narrow and limited class of extraordinary circumstances.

The inquiry in the case before us is whether the Secretary has so far violated constitutional prescriptions or specific congressional limitations as to cast his action outside the exceedingly broad boundaries within which he is free to act without judicial review.[21]

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[20] Perkins v. Elg, 307 U.S. 325, 349, 83 L.Ed. 1320, 59 S.Ct. 884 (1939).

[21] See Carrington, *Political Questions: The Judicial Check on the Executive*, 42 VA. L. REV. 175 (1956).

III

The nature of a passport. In *Urtetiqui* v. *D'Arbel*[22] the Supreme Court said in 1835:

> "It is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact."[23]

But, whatever may have been its nature in the past, the pertinent characteristic of a passport in the present controversy is that it is a requisite for going abroad. And thus it has become a tool with which the Department of State can prevent the presence of any American citizen in a foreign country.

A statute,[24] alluded to by the Supreme Court in *Johnson* v. *Eisentrager*,[25] provides that, whenever the President learns that a citizen of the United States has been deprived of his liberty by any foreign government, he must demand the reasons and, if it appears the imprisonment is wrongful, demand release and use such means not amounting to war as are necessary to effectuate the release. So, while a passport as such does not bestow rights of protection which a citizen does not otherwise have, it does, as a permit to travel abroad, allow him to put himself in a position where he may invoke the protective power of this government. So one of the questions here is whether the

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[22] 34 U.S. (9 Pet.) 692, 699, 9 L.Ed. 276.

[23] See 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW § 259 (1942).

[24] 15 STAT. 224 (1868), 8 U.S.C. § 903b [now 22 U.S.C.A. § 1732 (Supp. 1956)].

[25] 339 U.S. 763, 770, 94 L.Ed. 1255, 70 S.Ct. 936 (1950).

Secretary may prevent an American with Communist affiliations from being in a place where political indiscretion might involve the United States Government in international complications.

IV

The right to travel. The present dispute over passport denials is less than a decade old, but its antecedents are to be found deep in the history of Anglo-American law. The English sovereign had for many centuries a recognized right to prevent foreign travel and to recall subjects from abroad.[26] Late in the Eleventh Century Anselm, Archbishop of Canterbury, was forbidden by William Rufus, son of William the Conqueror, to go to Rome to receive the pallium from Pope Urban II.[27] The Magna Carta, as signed by John Lackland at Runnymede in 1215, deprived the King of the right to prevent foreign travel. However John died shortly afterward, and William Marshall, regent of Henry III, republished the Charter without the guarantees of freedom of travel.[28] In the following centuries the kings frequently exercised their prerogative, usually through the issuance of a writ *Ne Exeat Regnum*.[29] Parliament also exercised the prerogative by passing statutes which forbade foreign travel to certain classes[30] or which recognized the right of the

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[26] 1 BL. COMM. * 265; 3 CO. INST. * 178; 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 230 (6th ed. 1938); TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL LAW 128-130 (4th ed. 1890).

[27] 2 ENCYCLOPAEDIA BRITANNICA, *Anselm* (1945); BEAMES, NE EXEAT REGNO 1-2 (2d ed. 1824).

[28] See Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 GEO. L.J. 63, (1952), for a detailed account of the history of the Magna Carta and the status of the common law in this regard.

[29] 3 Co. INST. * 179.

[30] *Id.* at * 178-179.

King to limit travel.[31] However the writ has gradually fallen into disuse. It is most unlikely that a writ *Ne Exeat Regnum* would issue in modern England, except in time of war.[32] This does not mean that an Englishman has an enforceable right to a passport.[33]

The Articles of Confederation[34] and the Constitution of the United States[35] clearly recognized the right of citizens to travel among the various states. But whether the liberty mentioned in the Fifth Amendment included liberty to leave this country and circulate among foreign nations was not so clear. A three-judge federal District Court recognized in 1952 that a citizen has at least a limited right to international travel.[36] This court has since recognized that right.[37] However the existence of this limited right does not preclude the existence in the sovereign of a right to limit travel. The Supreme Court has established the power of the Government to recall a person from abroad to appear in a lawsuit, an exercise of the same sort of control over movement available to the English sovereign through *Ne Exeat Regnum*. In *Blackmer* v. *United States*[38] the Court made the broad

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[31] 5 RICHARD II, c. 2, §§ 6, 7 (1381), 2 STAT. AT L. 236 (Pick. 1762).

[32] See Note, 41 GEO. L.J., *supra* note 28, at 70; Diplock, *Passports and Protection in International Law*, 32 GROTIUS SOC. 42, 44 (1947).

[33] Diplock, *supra* note 32, at 53.

[34] Art. IV.

[35] Art. IV, § 2. See Hess v. Pawloski, 274 U.S. 352, 71 L.Ed. 1091, 47 S.Ct. 632 (1927); Williams v. Fears, 179 U.S. 270, 45 L.Ed. 186, 21 S.Ct. 128 (1900).

[36] Bauer v. Acheson, 106 F.Supp. 445 (D.C.D.C.).

[37] Shachtman v. Dulles, 96 U.S. App. D.C. 287, 225 F.2d 938 (1955).

[38] 284 U.S. 421, 437-438, 76 L.Ed. 375, 52 S.Ct. 252 (1932).

statement:

> "What in England was the prerogative of the sovereign in this respect, pertains under our constitutional system to the national authority which may be exercised by the Congress by virtue of the legislative power to prescribe the duties of the citizens of the United States."

While *Blackmer* refers to the power to limit foreign travel as being exercised by the Congress, the power is not solely congressional. In matters pertaining to war and emergency or to the foreign policy, the power may reside in the executive or in both branches jointly. Whatever the theoretical residence of such power, the power to limit travel has in fact been exercised through the cooperative efforts of Congress and the President. During the War of 1812 Congress forbade citizens to travel into enemy countries without passports.[39] During the Civil War passports were required of all persons entering or leaving the country.[40] In 1861 Secretary of State Seward ordered that "Until further notice, no person will be allowed to go abroad from a port of the United States without a passport either from this Department or countersigned by the Secretary of State". This action was taken by the executive branch on its own initiative, without the sanction of Congress.

In 1856 Congress had granted the Secretary of State sole authority to issue passports.[41] The Secretary was authorized to issue them "under such rules as the President shall designate and prescribe". In 1918 Congress, leaving intact the broad discretion inherent in the words just quoted, gave the President power to make it unlawful to leave the country in time of war without a

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[39] 3 STAT. 199 (1815).

[40] DEP'T OF STATE, THE AMERICAN PASSPORT—HISTORY AND DIGEST 50 (G.P.O. 1898).

[41] 11 STAT. 60.

passport.[42] The President exercised this power by an appropriate proclamation.[43] The period between the two World Wars saw Congress reaffirm in the executive the broad discretion declared in the 1856 act, the new language being "may grant".[44] This was in a 1926 act which remains today the underpinning of congressionally-granted executive power in the field. That period also witnessed the codification in 1938 of State Department passport regulations and their affirmation by executive order.[45]

The machinery which today enables the State Department to regulate travel through passport control began to take shape in June of 1941, when Congress[46] amended the act of 1918[47] to enable the President to make it a crime to leave the country without a passport, not only in time of war but also during the existence of the national emergency proclaimed by the President on May 27, 1941.[48] On November 14, 1941, President Roosevelt exercised the authority over entry and exit vested in him by the amendment.[49] President Truman declared the termination of that state of emergency on April 28, 1952.[50] But the termination of the World War II emergency did not affect the Korean emergency, declared by President

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[42] 40 STAT. 559, 22 U.S.C.A. §§ 223-226b (1952).

[43] 40 STAT. 1829 (1918).

[44] 44 STAT. 887 (1926), 22 U.S.C.A. § 211a.

[45] Exec. Order No. 7856, 3 FED. REG. 681, 22 C.F.R. §§ 51.1-51.77 (1949).

[46] 55 STAT. 252, 22 U.S.C.A. § 223 (1952).

[47] *Supra* note 42.

[48] Proc. No. 2487, 55 STAT. 1647.

[49] Proc. No. 2523, 55 STAT. 1696.

[50] Proc. No. 2974, 66 STAT. C31, 50 U.S.C.A. App. 3 (Supp. 1956).

Truman on December 16, 1950.[51] Consequently our nation has been in a continuing state of emergency since May of 1941.

By act of June 27, 1952,[52] Congress declared:

> "SEC. 215. (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof; * * *
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> "(b) * * * and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

This statute applies to any national emergency. It would appear that the Korean emergency, existing when the statute became law, made the section above quoted immediately operative. Any doubt on this score was removed by President Truman's proclamation of January 17, 1953,[53] specifically invoking the 1952 act.

Two conclusions emerge from this complex series of laws, proclamations and orders. First, it is forbidden to leave this country without a passport. This rule was specifically provided by the Congress in the 1952 act, by the President in Proclamation No. 3004,[54] and by the

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[51] Proc. No. 2914, *supra* note 2.

[52] 66 STAT. 190, 8 U.S.C.A. § 1185.

[53] Proc. No. 3004, 67 STAT. C31.

[54] *Ibid.*

Secretary in Section 53.1 of his Regulations.[55] Second, it is within the power of the Secretary of State to refuse to issue a passport. This power is lodged in him by the act of 1926,[56] as implemented in Section 124 of Executive Order No. 7856;[57] is both claimed by the Secretary in Sections 53.1-53.9 of the Regulations and exercised by him thereunder; and is reaffirmed by the President in Proclamation No. 3004. The restrictions of the 1952 act upon travel without a passport can be read intelligibly only in the light of the Secretary's long-recognized power to refuse a passport.

Shortly after the passage of the 1952 act the Secretary issued additional regulations to govern the issuance of passports.[58] This was done pursuant to Executive Order No. 7856, *supra*, which specifically provided that the Secretary may make rules additional to the rules contained therein, so long as they are not inconsistent therewith.

V

The regulations of the Department. The regulations which the Secretary promulgated[59] provide in substance that, in order that persons who support the world Communist movement may not through the use of United States passports further the purposes of that movement, no passport shall be issued to persons who are members of the Communist Party or to certain others who are believed to engage in activities which will advance that movement; that a person whose application is tentatively denied under the foregoing will be notified in writing,

[55] 22 C.F.R. § 53.1 (1949).

[56] *Supra* note 44.

[57] *Supra* note 45.

[58] 17 FED. REG. 8013 (1952); 22 C.F.R. §§ 51.135-51.143 (Supp. 1952).

[59] *Ibid.*

including notice of the reasons as specifically as security considerations permit; that such person will be entitled to present his case informally to the Passport Division and to appear before a hearing officer with counsel; and that if the decision is adverse it shall be in writing with reasons and the applicant shall be entitled to appeal to the Board of Passport Appeals, where he will be accorded a hearing with counsel. The regulations provide:[60]

> "*Oath or affirmation by applicant as to membership in Communist Party.* At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings."

The substantive part of the regulations[61] provides

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[60] 22 C.F.R. §51.142 (Supp. 1955).

[61] *Id.* § 51.135, reading in full text as follows:

"*Limitations on issuance of passports to persons supporting Communist movement.* In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

"(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion —not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party;

"(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement un-

that no passport shall be issued to certain described classes of persons. Roughly paraphrased those classes are (1) members of the Communist Party, (2) persons who have recently terminated Party membership under certain circumstances, (3) persons who support the Communist movement under certain circumstances, and (4) persons as to whom there is reason to believe they are going abroad for the purpose knowingly of advancing the Communist movement. We do not know from the record presently before us whether the Secretary would finally refuse a passport to Dr. Briehl if the matter were to progress to final decision, and we do not know in what proscribed class the Secretary might find Dr. Briehl upon the evidence before him if that evidence caused a refusal of the passport. And so we intimate no opinion upon the merits of Dr. Briehl's application; we have no opinion upon that subject. But, since we must determine the validity of the procedural provisions of the regulations, we face the validity of the underlying substantive provisions. We think those regulations[62] are valid as regulations.

The regulations in no way attempt to implement an unlimited discretion in the Secretary. They provide for peremptory denial of a passport under only one circumstance, admitted present membership in the Communist

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der such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement.

"(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement."

[62] *Ibid.*

Party (Sec. 51.142). Standards for denials upon other grounds are set up. That section of the regulations (51.135) obviously contemplates findings upon facts. It uses such terms as "under such circumstances as to warrant the conclusion"; "not otherwise rebutted by the evidence"; and "on the balance of all the evidence". Thus the regulations clearly require facts—revealed or unrevealed—and an evaluation of information. They do not provide for an unfettered discretion. Such provisions are the normal content of statutes or regulations which establish criteria for administrative action. Moreover, as we read the regulations, they refer to knowing associations with Communism.[63]

As we have pointed out, the Communist movement is, in the view of this Government, an aggressive conspiracy potentially dangerous to this country. Travel abroad by members of or adherents to the Communist movement is obviously an easy method of communication between such persons or organizations in this country and the prime sources of Communist policy and program in the Soviet Union and its satellites. Once a person with a passport is out of this country, this Government has no control over where he goes. His travel is controlled entirely by whatever countries he thereafter wishes to leave and to enter. The Department of State has authority to refuse to facilitate that communication.

In the second place, unless all the major foreign and fiscal policies of this Government, under two administrations of opposing political parties, have been a gigantic fraud, it is the unequivocal duty of the Department of State to prevent international incidents which might arouse hostile activities on the part of the Soviet Union or its satellites. To that end the Secretary may refuse to permit an adherent of the Communist movement,

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[63] Wieman v. Updegraff, 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215 (1952).

clothed with American citizenship, from being present in places where he may readily create incidents or may assert statutory rights to activity on the part of this Government in his behalf. The Secretary may preclude potential matches from the international tinderbox.

As is recognized throughout this opinion, consistently with the other opinions of this court in this field,[64] the restrictions imposed by these regulations and the underlying statutes upon the right to travel are impingements upon that phase of liberty and indirectly upon the exercise of First Amendment rights. And so the problem in the case is once more the familiar problem of balancing private right against public requirement.[65] Our conclusion is reached by such a balancing. In the international situation of the present, the reasonable requirements of national security and interest and the delicate characteristics of foreign relations outweigh the needs or desires of an individual to travel, when the Secretary finds the facts to be such as to preclude grant of a passport under the regulation.

We therefore conclude that persons properly found to come within Section 51.135 of the Regulations are not illegally denied any constitutional right if they are refused passports.

It is suggested to us that, since the Internal Security Act of 1950[66] made certain provisions pertaining to passports to members of registered Communist organizations, it preempted the field and rendered null all other statutes and regulations relating to Communists and passports.

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[64] *E.g.*, Schachtman v. Dulles, *supra* note 37; Boudin v. Dulles, *infra;* Robeson v. Dulles, 98 U.S. App. D.C. 313, 235 F.2d 810 (1956), *cert. denied*, 352 U.S. 895, 1 L.Ed.2d 86, 77 S.Ct. 131 (1956); Dulles v. Nathan, 96 U.S. App. D.C. 190, 225 F.2d 29 (1955).

[65] See American Communications Ass'n v. Douds, *supra*.

[66] Sec. 6, 64 STAT. 993, 50 U.S.C.A. § 785.

Such a conclusion would have to be an inference; we find no specific provision to that effect. We think the inference is not supportable. The 1950 act made it unlawful for a member of a registered Communist organization to apply for a passport or to use one, and made it unlawful for any officer or employee of the United States to issue a passport to such a member. It prescribed penalties up to $10,000 fine and five years' imprisonment for violation.[67] So the 1950 act relating to passports is a criminal statute. It applies to only a portion of the people to whom the Secretary's regulations apply, as is easily seen by reference to Section 51.135. Moreover the 1952 statute, making it a crime for any person to leave the country without a passport during an emergency, was passed after the 1950 act. The 1952 act continued in effect the system of travel control by passport denial employed since 1941. That fact compels the conclusion that the criminal sanctions of the 1950 act are in addition to, not to the exclusion of, that control. Passport regulations under the later act are not prohibited by the former. We think the 1950 act did not preempt the field in respect to passports and adherents to the Communist movement.

VI

The requirement for an affidavit. In the case at bar Dr. Briehl was advised in writing that it had been alleged he was a Communist. He was required to admit or deny that allegation under oath before the proceeding on his application went further. Dr. Briehl urges, as we have seen, that he is entitled to be confronted with witnesses and evidence sustaining the Secretary's suggestions of Communist affiliations. He says he is entitled to that revelation without first filing an affidavit in response to the suggestions. He says this is a requisite of due

[67] Sec. 15, 64 STAT. 1002, 50 U.S.C.A. § 794.

process. But our judicial process knows no such requirement. Our judicial process is that a party must plead before he is entitled to trial. There is nothing new or novel about that. Dr. Briehl says he is entitled to know his opponent's evidence before he pleads. Under the rules of civil procedure, if a defendant party does not plead, a default judgment is entered against him. We know of no reason why Dr. Briehl should not be required to admit or deny the Secretary's allegations before he gets an evidentiary hearing.

It is said that if Dr. Briehl should admit being a member of the Communist Party his application would thereupon promptly be denied, and therefore, it is said, no administrative remedy is really afforded him. But precisely the same thing happens to any party to a law suit. If he admits his opponent's allegations of fact he gets no evidentiary hearing; he gets an oral argument and perhaps a summary judgment against him. We know of no rule or doctrine that, if a party to a controversy admits adversary allegations of fact, the proceeding is void if no evidentiary hearing is thereafter afforded him. It is elementary that a party must raise an issue of fact in order to get a hearing on the facts.

In *National Council of American-Soviet Friendship* v. *Brownell*,[68] we held, citing several cases, that a party to an administrative proceeding could not default and still continue to litigate.

Moreover Dr. Briehl is an applicant. There is nothing new or novel about requiring an applicant for a permit or a license to supply pertinent information under oath. Applicants for radio licenses and air route certificates must do so, and applicants for marriage licenses, voting privileges, and business permits must also. And, failing to supply the required data, the applicant cannot exercise his right. We know of no reason why an appli-

[68] —— U.S. App. D.C. ——, 243 F. 2d 222 (1957).

cation for a passport should not be treated by the usual rules pertaining to applications. If Communist Party affiliations are pertinent to the Secretary's decision upon the possible consequences or complications of an applicant's presence in foreign countries or his roving about foreign areas in present world conditions, we see no reason why Communist affiliations should not be part of the data required by the application.

Dr. Briehl complains that the evidence in respect to the allegations asserted in the Secretary's advices to him may be in part confidential, and he argues that such possibility effectively nullifies the due process of the procedure. He seeks to bring the situation within the doctrine followed by the Ninth Circuit in *Parker* v. *Lester*,[69] that, if it be established in advance that a proffered administrative remedy will not afford due process, the remedy need not be pursued. It is true that a passport denial may be based upon confidential information. But due process of law is a term of variable content.[70] The necessity for secrecy in the conduct of foreign affairs has been asserted, seemingly without question, ever since President Washington refused to submit to the House of Representatives the documents relating to the Jay Treaty.[71] The Supreme Court said in the *Curtiss-Wright* case:[72]

> "The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive depart-

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[69] 227 F.2d 708 (1955).

[70] Moyer v. Peabody, 212 U.S. 78, 84, 53 L.Ed. 410, 29 S.Ct. 235 (1909); Communications Comm'n v. WJR, 337 U.S. 265, 275, 93 L.Ed. 1353, 69 S.Ct. 1097 (1949).

[71] See United States v. Curtiss-Wright Corp., *supra*, 299 U.S. at 320.

[72] *Id.* at 321.

> ments. In the case of every department except the Department of State, the resolution *directs* the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is *requested* to furnish the information 'if not incompatible with the public interest.' A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned."

And recognition of the necessity for secrecy in foreign affairs, coupled with a strong admonition to the judiciary against any attempts on its part to peer into or to unveil such confidential material, is contained in the Court's opinion in the *Chicago & Southern Air Lines* case, from which we have quoted. That case concerned the right of an American company to do business abroad. That was a right of the applicant if he could meet the appropriate specifications. But the Supreme Court specifically and emphatically pointed out that the President could deny the application for secret and confidential reasons. We know of no reason why an individual's right to travel abroad is to be treated by different constitutional standards than is his right to do business abroad. And we know of no reason why treatment of alleged Communist affiliation is to be put upon a preferred basis as compared with ordinary commercial infirmities or adverse suggestions.

Further justification for secrecy in a case of this type is supplied by the fact that the nation is in a state of national emergency, caused by the infiltration program of the Communist movement. During such an emergency cabinet officers may be forced to act on the basis of information the publication of which is inconsistent with national security. When the Secretary of State avows that in the interest of national security he cannot spread certain information on an open record, and explains with as much particularity as possible the reasons why he cannot do so, courts must rely upon his integrity and accept his statement.

We held in *Boudin* v. *Dulles*[73] that, where a passport has been denied by the Secretary on the authority of a specific regulation, he (the Secretary) must make findings in writing responsive to the requirements of that regulation, and in such a case must state whether the findings are based on evidence openly produced or on secret information and, if the latter, "should explain with such particularity as in his judgment the circumstances permit the nature of the reasons why such information may not be disclosed." We adhere to that ruling. We are of the view that due process in passport proceedings does not prevent the use of confidential information when foreign affairs or the national security is involved.

In summary on this point we are of opinion that, if a person falls within one of the classes described in the regulations, the Secretary may refuse him a passport; and it follows that, if it be alleged he is in one of those classes and he refuses to admit or deny the allegation, the passport may be refused.

From the foregoing basic considerations some conclusions are easily reached. We summarize. In the deliberate judgment of this Government the Communist movement is today a conspiracy for world domination sufficiently threatening to the security of this nation to justify the expenditure of billions of dollars every year to thwart its ambitions. Limitations and prohibitions upon leaving one's country and traveling abroad have been enforced in periods of stress since time immemorial. It would be idle, if not ridiculous, in view of the absorption of the whole world in the problem of the Communist program and of the extent of the attention and activity of our own Government in that respect, for any court to say the present is not a period of stress in international affairs.

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[73] 98 U.S. App. D.C. 305, 235 F.2d 532 (1956).

The present limitations upon travel effectuated by passport control are authorized by statute and by presidential proclamation. They are, as we said in *Shachtman v. Dulles*,[7] an impingement upon a natural right of a citizen to travel. But no right, even the right to life, is absolute, and so the inquiry must be whether the impingement is valid. Executive action in the field of foreign affairs has been clothed in secrecy since the foundation of the Republic, and the Supreme Court has invariably protected that secrecy and repeatedly warned the judiciary not to invade that realm of executive prerogative. The rule has been applied by the Court even where the matter involved was transportation over international routes. Requirements that one admit or deny an adversary's allegations of fact before the right to an evidentiary hearing arises are elementary in judicial process; *a fortiori* in quasi-judicial process. And requirements that an applicant for a permit submit prescribed pertinent data as a prerequisite to consideration of his application are usual and valid in administrative procedure.

Analyzed to its underlying elements the critical problem in the case before us is simply whether the Secretary of State may decline to issue a passport to a person who refuses to admit or deny that he is a member of the Communist Party. We think he may. Or to state the problem in different terms, it is whether membership in or adherence to the Communist Party is a valid subject of inquiry prerequisite to the issuance of a passport under world conditions. We think it is.

We are of opinion that the disputed regulations of the Secretary are valid and that Dr. Briehl did not qualify himself for a passport under them. The judgment of the District Court, granting the Secretary's motion for summary judgment is

Affirmed.

WASHINGTON, *Circuit Judge*, concurring in the result:

The record discloses a "tentative" refusal by the Passport Office to renew Dr. Briehl's passport, and an official determination by that Office not to render a final decision on the matter because of Dr. Briehl's refusal at his hearing to furnish an affidavit, as provided for in Section 51.142 of the Passport Regulations, "with respect to present or past membership in the Communist Party." Unlike the applicant in *Robeson* v. *Dulles*, 98 U.S.App.D.C. 313, 235 F.2d 810, cert. denied, 352 U.S. 895 (1956), the appellant in this case has pursued the administrative and judicial steps open to him to raise the question whether the Secretary of State may validly require such an affidavit as a condition precedent to the rendering of a final decision. That question must now be decided.

The Secretary seeks to uphold his power to elicit information as to Communist Party membership as a procedure incident to the substantive power to restrict foreign travel through passport denial. Affidavit requirements of this sort are ordinarily valid if the information elicited is relevant to the exercise of a valid power. *Cf. Garner* v. *Board of Public Works*, 341 U.S. 716 (1951).[1] Implicit in the decisions of this court is the holding that the Secretary possesses a substantial measure of authority to restrict travel by passport denial.[2]

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[1] When the Supreme Court in *Garner* determined that the state agency may properly elicit from city employees information "that may prove relevant to their fitness and suitability for the public service," 341 U.S. at 720, it apparently assumed the proposition that the state agency had power to bar from employment those who are *not* fit or suitable for the public service.

[2] See Shachtman v. Dulles, 96 U.S.App.D.C. 287, 225 F.2d 938 (1955); Boudin v. Dulles, 98 U.S.App.D.C. 305, 235 F.2d 532 (1956); Dayton v. Dulles, 99 U.S.

While the precise extent of that authority is still in process of being defined, Congress has not been silent or inactive. In the 1941 travel control statute, 8 U.S.C. § 1185, Congress provided, in substance, that when the President has proclaimed a national emergency and when he has found that the interests of the United States require additional restrictions on the departure of persons from the United States, it shall be unlawful for a citizen to leave the country without a valid passport. As Judge Prettyman points out, this statute has become operative. I read it as having been intended to authorize the Secretary to control, by passport denial, the travel of those whose journeying abroad is reasonably found to be contrary to the interests of the United States.

In the Internal Security Act of 1950, Congress made the following legislative finding, whose validity today can hardly be subject to challenge:

> "Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement." 50 U.S.C. § 781(8) (1952).

Congress implemented that finding by Section 6 of the Internal Security Act, 50 U.S.C. § 785 (1952), a provision which the framers of the Act no doubt thought would come into effect at a much earlier date than in fact has proved possible. But the congressional finding remains as an admonition to the executive branch to use

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taken by Judge Bazelon in his learned dissent is opposed to the spirit if not the letter of these decisions. But it may be agreed that further congressional action in the passport field would be very desirable.

its authority in all lawful ways to control the "travel of Communist members, representatives, and agents" so as not to facilitate communication or otherwise "further the purposes of the Communist movement." Therefore, I have no doubt that the Secretary has the power—in some cases at least—to deny passports on grounds to which past or present membership in the Communist Party "may prove relevant." *Garner*, *supra* at 729.

It must be admitted, I think, that the affidavit requirement does infringe Dr. Briehl's interest in maintaining privacy and upon interests protected by the First Amendment.[3] But if the interests of the public are also involved, the problem is "to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." *American Communications Ass'n* v. *Douds*, *supra*, at 399. The information as to Communist Party membership is asked for in connection with a passport application and might prove relevant to a valid denial of a passport. Under all the circumstances, it seems clear that the benefit to the public order, in having information of this sort available to the Secretary to enable him to exercise his lawful authority, substantially outbalances any abridgement of individual interests that may result. As Mr. Justice Murphy observed, concurring in *Board of Education* v. *Barnette*, 319 U.S. 624, 645 (1943): "The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, *except insofar as essential operations of government require it for the preservation of an orderly society*, —as in the case of compulsion to give evidence in court." (Emphasis supplied.) In the exercise of his powers over

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[3] See American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950); see also United States v. Rumely, 345 U.S. 41, 56 (1953).

the granting or withholding of passports, the Secretary is similarly entitled to relevant information.

For these reasons, I find no infirmity in the statutory and regulatory system which authorizes the Secretary to withhold a passport from any person who, by refusing to furnish the required affidavit, fails to complete his application.[4] Appellant has not suggested any reason or rule of law that would require a governmental agency to proceed to hear and determine on its merits the claim of a person seeking to exercise a right or privilege, when the claimant declines to file a complete application, as required by statute or by a regulation having—like the present one—the force of law.[5] Surely if a person desiring to vote declines to answer a question which may prove relevant to a valid ground of denial—such as his age, or where and when he last voted—an election board may thereupon refuse to permit him to vote until the question is answered, and need not make a considered determination that in fact he is ineligible. And even if the decision to deny a right could be said to require an exercise of discretion, I do not see why the decision-

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[4] 22 U.S.C. § 213 (1952) requires every passport applicant to furnish under oath an application containing "a true recital of each and every matter of fact which may be required by law or by any rules authorized by law." See also 22 C.F.R. 51.14. Section 51.142 of the regulations authorizes the affidavit, and Section 51.71 specifies that the affidavit "shall be considered as, and become, a part of the application."

[5] The thrust of appellant's argument is that the issuance of a passport is being unlawfully conditioned upon the requirement of a "test oath." But as the Supreme Court pointed out in *Garner, supra*, entirely different issues are raised by a requirement that certain conduct or affiliation be denied under oath, and by a requirement that information "with respect to" a stated subject matter be given.

maker must act in spite of the fact that he has not received answers to relevant questions which were properly asked, and which may provide information necessary for a proper decision.

It is important to bear in mind the distinction, which the Supreme Court pointed out in *Konigsberg* v. *The State Bar of California*, 353 U.S. 252 (1957), between the two courses of governmental action that can follow a refusal to answer a particular question propounded by a government agency. In *Konigsberg*, an adverse inference was drawn from a refusal to answer, and governmental action—denial of bar membership—was based in part on this inference. The Court held the inference to be unreasonable, since the refusal appeared to be based on a good faith reliance on a constitutional privilege and therefore would not necessarily give rise to the adverse inference which the State had drawn. On the other hand, in the case at bar, no adverse inference was drawn from a refusal to answer. Here the government agency asserted its right to have certain information which was relevant to the exercise of valid authority, and declared in advance that it would not proceed until the information was forthcoming. This is precisely the sort of situation which the Court in *Konigsberg* contrasted with the inference-drawing approach that had been used there. As to this situation, the Court indicated that a serious First Amendment question would be raised, as has been recognized in this opinion, and that there would be a question of fairness if the applicant were not warned of the consequence of failure to answer. Here the regulations plainly indicate the result of a refusal to answer.

At this stage we are concerned only with a request for identification of affiliation *vel non*, unaccompanied by any direct penalty stemming from such identification. "No doubt issues like those now before us cannot be completely

severed from the political and emotional context out of which they emerge. For that very reason adjudication touching such matters should not go one whit beyond the immediate issues requiring decision." *American Communications Ass'n* v. *Douds*, *supra*, at 416 (Frankfurter, J., concurring in part). The question whether past or present membership in the Communist Party is in itself sufficient to support denial of a passport is not before us: there has not here been a denial based on such membership.[6]

It is also unnecessary and inappropriate for us to decide such questions as whether the Secretary's regulations are in every particular valid, whether he is justified in using confidential information, whether he must always hold a hearing, and the like. We need not in the present case attempt fully to define the scope of the Secretary's power, or that of the courts. We should do no more than decide the question actually before us.

BAZELON, *Circuit Judge*, with whom EDGERTON, *Chief Judge*, concurs, dissenting: The Secretary of State says his regulations, pursuant to which he denies passports to persons who "support the Communist movement," are a valid exercise of discretion delegated to him by the President. I think they are invalid because (1) the President did not undertake to delegate the discretion

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[6] See Garner, *supra* at 720: "The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party . . . . *Not before us is the question whether* the city may determine that an employee's *disclosure* of such political affiliation *justifies his discharge*." (Emphasis supplied.)

the Secretary claims and (2) the President himself did not have this discretion.

For many years the Secretary of State has claimed an unlimited discretion to deny passports.[1] During the greater part of our history, when a passport was merely a comfort to the traveller but not a necessity,[2] his claim went unchallenged. Since 1941, however, a passport has been a travel necessity,[3] and when the Secretary began denying or revoking passports on such grounds as "activities contrary to the best interests of the United States," or Communist membership or support, applicants turned to the courts for relief.[4]

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[1] See 3 Hackworth, DIGEST OF INTERNATIONAL LAW § 268 (1942).

[2] *Shachtman* v. *Dulles*, 96 U.S.App.D.C. 287, 289-90, 225 F.2d 938, 940-41 (1955).

[3] Actually the first requirement of a passport for travel was during World War I. Act of May 22, 1918, 40 STAT. 559, Proclamation No. 1473, Aug. 8, 1918, 40 STAT. 1829. These controls expired March 3, 1921. PUB.RES.No. 64, 41 STAT. 1359. By Act of June 21, 1941, 55 STAT. 252, Congress amended the 1918 Act to apply during a proclaimed emergency and, on November 14, 1941, the President issued Proclamation No. 2523, 55 STAT. 1696, restoring travel controls which have remained in effect since then. The 1941 statute was replaced by § 215 of the Immigration and Nationality Act of 1952, 66 STAT. 190, 8 U.S.C. § 1185, and on January 17, 1953, the revised statutory authority was invoked by Proclamation No. 3004, 67 STAT. c. 631.

In addition to being legally required as an exit permit, a passport has become a practical necessity because foreign countries have increasingly been requiring it as a condition to entry. See *Shachtman* v. *Dulles*, 96 U.S.App.D.C. at 290, 225 F.2d at 941; *Bauer* v. *Acheson*, 106 F. Supp. 445, 451 (D.D.C. 1952); Comment, 61 YALE L.J., *infra* note 28, at 171-72.

[4] See, for example, *Bauer* v. *Acheson*, *supra* note 3; *Dulles* v. *Nathan*, 96 U.S.App.D.C. 190, 225 F.2d 29 (1955);

Bauer v. *Acheson*, 106 F.Supp. 445 (D.D.C. 1952), was the first reported case. There the Secretary based his authority on the President's inherent foreign relations power, and on the provision of 22 U.S.C. § 211a that the Secretary "*may* grant . . . passports . . . under such rules as the President shall designate and prescribe . . . ." The court held there was no authority to refuse or revoke a passport without notice and hearing. Less than two months later and presumably as a result of that decision, the Secretary promulgated the regulations now before us, declaring Communist supporters ineligible for passports and establishing a notice and hearing procedure.[5] *Until then, the only substantive passport qualification ever imposed by any statute*[6] *or regulation was citizenship.*[7]

Shachtman v. *Dulles*, *supra* note 2; *Boudin* v. *Dulles*, 98 U.S. App.D.C. 305, 235 F.2d 532 (1956); *Robeson* v. *Dulles*, 98 U.S.App.D.C. 313, 235 F.2d 810 (1956), *cert. denied*, 352 U.S. 895 (1956); *Dayton* v. *Dulles*, 99 U.S.App.D.C. 47, 237 F.2d 43 (1956).

[5] 17 FED.REG. 8013, Sept. 4, 1952, 22 C.F.R. §§ 51.135-51.143 (1957 Supp.).

[6] Section 6 of the Internal Security Act of 1950, 64 STAT. 993, 50 U.S.C. § 785, which makes it a crime for a "member of a [Communist] organization" to apply for or use a passport, is inoperative until such an organization has registered or been finally ordered to do so. Neither of these events has occurred. *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956), *reversing*, 96 U.S. App.D.C. 66, 223 F.2d 531 (1954).

[7] The Act of May 30, 1866, 14 STAT. 54, disqualified non-citizens. By Act of June 14, 1902, 32 STAT. 386, the law was amended to disqualify persons not owing allegiance to the United States, "whether citizens or not." The amendment was designed to cover citizens of Puerto Rico, Hawaii, and the Philippines. 35 CONG.REC. 5697-99, 6588-89, 57th Cong., 1st Sess. (1902). The statute is now codified as 22 U.S.C. § 212. For convenience, the class of eligibles will be referred to herein as "citizens."

As authority for his new regulations, the Secretary relied on 22 U.S.C. § 211a,[8] the same statute he had relied on in *Bauer*. He continued this reliance in later cases. In the present case he says: "In the light of the broad language of this statute, there is no occasion here to determine whether the President's plenary executive power over foreign affairs in itself furnishes sufficient authority to the Secretary to deny passports to American citizens in accordance with the reasonable standards prescribed by him."[9] But he adds that "if some additional source of authority were needed, it is supplied by the travel control statutes which Congress has repeatedly enacted";[10] and "the language of the [travel control] statute makes it plain that during [a proclaimed emergency] this authorization becomes incorporated, in effect, into § 211a itself."

But in *Stewart v. Dulles*, Nos. 13533, 13622 and 13638, briefed and argued after the present case and now awaiting decision, the Secretary conceded that § 211a "confers no substantive power," and he "assume[d]" that he "had no authority to impose this kind of direct restraint upon travel." "It was for this very reason," he said, "that Congress enacted what is now 8 U.S.C. § 1185, authorizing the President, in times of war or national emergency, to use his inherent powers in the field of passport issuance as a means of directly controlling the travel of citizens." The argument now is that (1) 22 U.S.C. § 211a and the inherent executive power, though ineffective to control travel, give the Secretary discretion as to

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[8] 22 C.F.R. p. 98 (1957 Supp.); 17 FED.REG. 8013.

[9] See also the Secretary's brief in *Boudin v. Dulles*, *supra* note 4, at p. 16.

[10] *Supra* note 3.

passport issuance; and (2) under 8 U.S.C. § 1185, upon proclamation of an emergency by the President, any person to whom the Secretary, in his discretion, refuses a passport, may not leave the country. Thus, the Secretary claims that Congress has delegated to him, through the President, the power to establish categories of persons ineligible to leave the country.

I.

The Claimed Delegation

The authority conferred on the President by 22 U.S.C. § 211a was exercised through Executive Order No. 7856, on March 31, 1938.[11] The Executive Order designated only one general category of passport eligibility, that created by 22 U.S.C. § 212, namely, persons who are citizens of the United States. 22 C.F.R. § 51.2 (1949). Beyond that, the order confined itself to specifying the formal requirements of the passport application (*e.g.*, the type and size of photographs to be attached), *id.*, § 51.23q, and the evidence of citizenship to be furnished, and providing for amendment, renewal and extension of passports and specifying the fees to be collected. In addition, it authorized the Secretary of State, "in his discretion to refuse to issue a passport . . ." and "to make regulations . . . additional to the rules in this part and not inconsistent therewith." *Id.*, §§ 51.75, 51.77. Pursuant to this latter authority, the Secretary, on the day of the President's order, issued Departmental Order 749, promulgating the Department's regulations, consisting merely of procedural implementation of the President's rules.[12]

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[11] 3 FED.REG. 799, 22 C.F.R. §§ 51.1 - 51.77 (1949).

[12] 22 C.F.R. §§ 51.101 - 51.134 (1949); and see source note at p. 103. "A study of the executive order and the depart-

The regulations in question in the present case, which the Secretary added four years later and after the *Bauer* decision, were the first attempt, by regulations issued under 22 U.S.C. § 211a, to affect anything more than procedure or form.[13] In view of the purely procedural nature of the President's rules, his accompanying grant to the Secretary of authority to make "additional . . . and not inconsistent" regulations confers no power to create substantive disqualifications.

Nor did the President's Proclamation No. 3004,[14] making operative the travel control provision of 8 U.S.C. § 1185, give the Secretary this authority. Section 1185 prohibits departure from the United States without a valid passport during a proclaimed emergency, "except as otherwise provided by the President, and subject to such limitations as the President may authorize and prescribe . . . ." When the proclamation was issued, regulations existing under an earlier proclamation were in force, providing generally that no person could enter or leave the country without a valid passport, except for travel to and from certain countries. 22 C.F.R. §§ 53.1-53.9 (1949). Proclamation No. 3004 did not undertake to grant power to the Secretary to control travel by establishing additional categories of passport ineligibility. It merely declared that "departure and entry would be sub-

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mental order indicates that the chief element in the discretion exercised by the Secretary of State concerned the type of proof required to establish citizenship or allegiance." Note, 41 GEO.L.J., *infra* note 28, at 76.

[13] See Department of State, THE AMERICAN PASSPORT, ch. IV (1898); Exec. Order No. 654, June 13, 1907; Exec. Order No. 4359-A, Dec. 19, 1925; Exec. Order No. 4382-A, Feb. 12, 1926; Exec. Order No. 4488, Aug. 3, 1926; Exec. Order No. 5860, June 22, 1932; Exec. Order No. 6650, March 23, 1934.

[14] *Supra* note 3.

ject to the already *established travel control regulations, 22 C.F.R. §§ 53.1-53.9, referring to them specifically and incorporating them into the proclamation.*[15] It added an authorization to the Secretary "to revoke, modify or amend such regulations as he may find the interests of the United States to require." This authorization, like the authorization of Executive Order No. 7856 to issue "additional" *passport* regulations, must be read in its context. Thus read, it grants the Secretary discretion of the type already exercised in his existing travel control regulations, namely, to determine which parts of the world can be visited by Americans only if they have passports, but not to determine which Americans are to receive passports.

Thus neither Executive Order No. 7856, which confers upon the Secretary authority received by the President under 22 U.S.C. § 211a, nor Proclamation No. 3004, which confers upon the Secretary authority the President holds under 8 U.S.C. § 1185, undertakes to delegate to the Secretary any power to create substantive passport disqualifications.

Nor could the President delegate such power; for neither statute conferred it upon him.

II.

The President's Statutory Power

A. The Passport Statutes Do Not Purport to Confer the Power Here Claimed.

Section 211a of 22 U.S.C. says nothing about categories of ineligibility. Indeed, the Secretary concedes that the

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[15] The regulations involved in this case, which were also in existence when the proclamation was issued, were not referred to directly or indirectly.

purpose of the Act of August 18, 1856,[16] from which § 211a derives, was to prohibit passport issuance by anyone other than the Secretary of State. Nothing in the legislative history of the 1856 statute suggests that the words "may grant and issue" confer power to set up substantive categories of ineligibility. From the little that history reveals, it appears that the purpose of Congress was merely to control the procedure of passport issuance.[17] Fairly read § 211a grants the Executive only such discretion as may be necessary for elaborating a procedure for issuing passports, *e.g.*, as to the type and quantum of evidence of citizenship.[18] And so the statute was read by our Presidents in former times.[19]

Nor did 8 U.S.C. § 1185 authorize the President to create such substantive passport disqualifications as are contained in the regulations before us. Subsection (a) of § 1185 did not purport to give the President power to establish criteria for restricting anyone's right to travel. It merely authorized him to invoke restrictions set forth in the statute if he found that "those provided otherwise than by this section" were inadequate to protect the public safety. Moreover, when the Act was first adopted in 1918 and when it was reenacted in 1941,[20] there were no restrictions on citizens' travel "provided otherwise than

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[16] 11 STAT. 60; reenacted in substantially the same form by the Act of July 3, 1926, c. 772, § 1, 44 STAT. 887. The language of the original act was "shall be authorized to grant" rather than "may grant," but the effect is the same.

[17] Comment, 23 U.CHI.L.REV., *infra* note 28, at 272 n. 25; Doman, *A Comparative Analysis: Do Citizens Have the Right to Travel*, 43 A.B.A.J. 307, 308 (1957).

[18] The original 1856 Act; 11 STAT. 60, combined the present § 211a with the present § 212 which disqualifies noncitizens.

[19] *Supra* note 13.

[20] *Supra* note 3.

or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government." 15 STAT. 223-224 (1868), R.S. § 1999, 8 U.S.C. § 800 (1940).[21] Although designed to apply especially to the rights of immigrants to shed their foreign nationalities, that Act of Congress "is also broad enough to cover, and does cover, the corresponding natural and inherent right of American citizens to expatriate themselves." *Savorgnan* v. *United States*, 338 U.S. 491, 498 n. 11 (1950).[22] The Supreme Court has held that the Citizenship Act of 1907 and the Nationality Act of 1940 "are to be read in the light of the declaration of policy favoring freedom of expatriation which stands unrepealed." *Id.* at 498-99. That same light, I think, illuminates 22 U.S.C. § 211a and 8 U.S.C. § 1185. Since expatriation is today impossible without leaving the country,[23] the policy expressed by Congress in 1868 and never repealed precludes a reading of the passport and travel control statutes which would permit the Secretary of State to prevent citizens from leaving. The Secretary's construction of the statutes would impinge also upon the Internal Security Act of 1950.[24] Congress there made it unlawful for a member of a Communist organization to apply for or use a passport, but only after such organization has registered under the Act or has been finally ordered to do so. Neither of those events has occurred.[25] Moreover, the prohibition was

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[21] This act, though no longer included in the United States Code, has not been repealed and is still in effect. *Savorgnan* v. *United States*, 338 U.S. 491, 498-99 (1950).

[22] See also *op.cit. supra* note 1, p. 163.

[23] 8 U.S.C. §§ 1481 and 1483 (1952); *Savorgnan* v. *United States*, 338 U.S. at 503.

[24] *Supra* note 6.

[25] *Ibid.*

by this section." What Congress had in mind, therefore, in § 1185(a), was the problem of movements of *aliens*, not citizens. And Congress set forth, in subparagraphs (1) through (7) of subsection (a), a system of exit and entry permits to control movements of aliens.

It is subsection (b) of § 1185 which is relevant to citizens. That subsection provided that, upon issuance of the President's proclamation, "it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen to depart from or enter, or attempt to depart from or enter, the United States, unless he have a valid passport." Thus citizens were forbidden to travel without passports, but the President was authorized to establish conditions and exceptions to this prohibition. But the subsection did not authorize the President to decide which categories of citizens might receive passports.

Though neither 22 U.S.C. § 211a nor 8 U.S.C. § 1185 explicitly confers the authority the Secretary claims, he urges us to read them through a wide lens and find in them a congressional intent to authorize his regulations. His contention comes to this, that Congress has by implication, though not expressly, authorized the Executive to decide which Americans shall be confined within our boundaries. In my opinion such an intention may not be read into the statutes because (1) it would conflict with other expressions of congressional policy and (2) it would raise grave constitutional doubts.

B. The Secretary's Reading of the Statutes Conflicts with Congressional Policy.

Almost a century ago, Congress declared that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness," and decreed that "any declaration, instruction, opinion, order,

circumscribed by procedural safeguards not found in the Secretary's "Communist supporter" regulations involved here; and it was substantively limited to "members" of the proscribed organization, whereas the Secretary's regulations apply "regardless of the formal state of [the applicant's] affiliation with the Communist party . . ." [26] These declarations of congressional policy make it unlikely that by other statutes Congress intended to authorize a different policy.[27] "The legislative process is especially qualified and the administrative process is especially unfit for the determination of major policies that depend more upon emotional bent and political instincts than upon investigation, hearing and analysis." Davis, ADMINISTRATIVE LAW 57 (1951).

I would not construe the statutes as conferring upon the Secretary by implication broad powers which they do not explicitly confer, *United States* v. *Minker*, 350 U.S. 179, 190 (1956), especially when serious restraints on liberty are entailed. *Ex parte Endo*, 323 U.S. 283, 299-300 (1944).

C. The Secretary's Reading of the Passport Statutes Is Constitutionally Doubtful.

The broad construction the Secretary would have us place on the passport statutes would raise grave constitutional doubts.[28] Statutes must be construed narrowly

[26] In the last session of Congress, legislation was introduced by Representative Walter, which would have amended the Administrative Procedure Act to provide for a passport review procedure and would have denied passports to persons under Communist discipline in much the fashion now employed by the State Department. The bill died in committee. H.R. 9991, 102 CONG.REC. 1266, 84th Cong., 2d Sess., March 15, 1956.

[27] See Note, 41 GEO.L.J., *infra* note 28, at 89.

[28] Comment, *The Passport Puzzle*, 23 U.CHI.L.REV. 260

if to do so avoids a serious constitutional questio
United States v. *Rumely*, 345 U.S. 41, 46 (1953); *Unite*
States v. *Witkovich*, 25 U.S.L. WEEK 4266, 4269, April 3
1957.

We recognized in *Shachtman* that the individual's righ
to travel is a natural right protected by the Constitu
tion.[29] Since denial of a passport now abridges tha
right, pasport applicants are entitled to both the pro
cedural[30] and substantive[31] safeguards of the Fifth
Amendment. The broad interpretation urged by the
Secretary would require us to decide whether it is con-
sistent with due process of law, and with First Amend-
ment rights,[32] to deprive an individual of so large a part

(1956); Note, *Passports and Freedom of Travel: The Con-*
flict of a Right and a Privilege, 41 GEO.L.J. 63, 88 (1952);
Note, *"Passport Denied": State Department Practice and*
Due Process, 3 STAN.L.REV. 312 (1951); Parker, *The Right*
to Go Abroad: To Have and to Hold a Passport, 40 VA.L.
REV. 853, 870 (1954); *Passport Refusals for Political Rea-*
sons: Constitutional Issues and Judicial Review, 61 YALE
L.J. 171 (1952).

[29] 96 U.S.App.D.C. at 290, 225 F.2d at 941. See also *Wil-*
liams v. *Fears*, 179 U.S. 270, 274 (1900), referring to "free-
dom of egress from the State."

[30] *Dayton* v. *Dulles*, *supra* note 4; *Boudin* v. *Dulles*, *supra*
note 4; *Bauer* v. *Acheson*, *supra* note 3; see also *Dulles* v.
Nathan, *supra* note 4, remanding *Nathan* v. *Dulles*, 129
F.Supp. 951 (D.D.C. 1955); for vacation of judgment and
dismissal of complaint on ground of mootness.

[31] *Shachtman* v. *Dulles*, *supra* note 2; see *Kraus* v. *Dulles*,
98 U.S.App.D.C. 343, 235 F.2d 840 (1956).

[32] In saying in the *Communist Party* case "that the Gov-
ernment may validly decline" a passport to a Communist,
this court was referring to the passport in its aspect as a
documentary assurance of "the protection and good offices of
American diplomatic and consular officers abroad," 96 U.S.
App.D.C. 66, 90, 223 F.2d 531, 555 (1954), and not as an
exit permit indispensable to travel. As for the latter aspect

of his liberty under the standards and procedures the Secretary employs; and whether, if Congress possesses such power, it may validly delegate to the Secretary or the President a "discretion . . . unconfined and vagrant . . . [not] canalized within banks that keep it from overflowing." [33]

The word "Communist" is not an incantation subverting at a stroke our Constitution and all our cherished liberties. If today the threat of Communism justifies confining within our boundaries any citizen who will not swear that he is not a Communist,[34] tomorrow the same logic,

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of a passport, *i.e.*, whether a restriction upon liberty to travel is constitutional, the court said, ". . . we need not, and do not, enter upon consideration of that question . . . ." 96 U.S.App.D.C. at 91, 223 F.2d at 556. Later in *Shachtman*, the court did consider that question and concluded, as we have already seen, that there is a constitutionally protected right, *supra* note 29; but how much protection springs from the First Amendment has not been determined.

[33] Mr. Justice Cardozo dissenting in *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 440 (1935). The Secretary argues that standardless delegation is not invalid in a field where the Executive possesses inherent power, citing *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). As I shall show, however, the delegation problem cannot thus be avoided, for the authority here claimed is not encompassed within the President's inherent power in the field of foreign relations.

[34] The majority finds "nothing new or novel about requiring an applicant for a permit or a license to supply pertinent information under oath." But the analogy sought to be established founders upon the hard fact that the passport applicant does not seek a permit or a license—he seeks to implement a constitutionally protected *right*. The requirement of the affidavit is also sought to be defended by analogy to ordinary pleading rules. But this analogy also collapses. Pleadings may be in the alternative; they may be inconsistent or hypothetical; they are not under oath. A defendant is not required to submit to a test oath as a qualification of his right to receive justice.

will justify control of movement from one state to another, for that is no less useful in communication than travel abroad. By no great extension of the court's reasoning, an oath can be required as a condition to the enjoyment of every other right we have. Food, clothing, shelter, education, recreation—all help to sustain the individual, develop his powers, and make him a more dangerous antagonist.

The due process problem is not avoided by reliance upon *Galvan* v. *Press*, 347 U.S. 522 (1954); nor the First Amendment problem by reliance upon *American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950).

In holding in *Galvan* that Congress could constitutionally provide for deportation of an alien who becomes a Communist after entry, the Supreme Court said: "The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security."[35] The greater power which the Government possesses in respect of aliens[36] may legitimatize treatment which could not lawfully be directed against citizens. *Galvan* provides no constitutional basis for banishing a *citizen* who becomes a Communist.

So far as the First Amendment problem is concerned, whether we apply the "clear and present danger test,"[37] or some aspect of the "reasonable relation" test,[38] we are engaged in weighing the individual's need to be free against the Government's need to restrain him. Each case is bound to turn on the nature of the freedom involved, the

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[35] 347 U.S. at 530.

[36] See discussion at note 90 *infra* and related text.

[37] *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945).

[38] *Dennis* v. *United States*, 341 U.S. 494, 510 (1951), adopting the statement of Chief Judge Hand below, *United States* v. *Dennis*, 183 F.2d 201, 212 (2d Cir. 1950).

public detriment it conflicts with and the type of restraint imposed. It is unlikely that a case arising in one context will determine a case arising in another. *Douds* falls far short of determining our present problem.

In *Douds* the Court upheld the constitutionality of § 9(h) of the National Labor Relations Act, withdrawing N.L.R.B. privileges from unions whose officers fail to submit non-Communist affidavits. The Court found that, since unions are clothed by Federal law with great powers for good or evil, "the public interest in the good faith exercise of that power is very great." 339 U.S. at 401-02. It observed that (1) "§ 9(h) touches a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint," *id.* at 404; (2) there is no constitutional right to occupy the position of a labor leader in the sense that "the loss of [the] particular position [would be] the loss of life or liberty," *id.* at 409; (3) § 9(h) imposes no direct restraint on freedom of belief or association, since its "discouragements" operate "only against the combination of [particular] affiliations or beliefs with occupancy of a position of great power over the economy of the country," *id.* at 403-04;[39] and (4) § 9(h), if not complied with, makes it not impossible, but only more difficult, for unions to remain effective, *id.* at 390.[40]

Whether travel by Communists is a danger on a par with their occupancy of powerful union offices is at least questionable. Prevention of travel does not prevent communication. Conspirators could still use the mails, cables, telephones, radio and, not least, foreign embassies and consulates in the United States. The discomfiture of a

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[39] See also the concurring opinion of Mr. Justice Jackson.

[40] That some unions have remained powerful and effective without the privileges of the Labor Relations Act is common knowledge.

few individuals who would have to send messages rather than make speeches[41] may not, in the constitutional balancing process, outweigh the citizen's right to travel. On the other side of the scales, it appears that (1) the passport statutes, unlike that in *Douds*, touch not a handful of persons, but many thousands (in the Secretary's view, as many thousands as he may choose to suspect); (2) unlike the statute in *Douds*, these involve a constitutionally protected right to travel; (3) they not only impose what *Douds* called an *indirect* restraint on First Amendment rights by "discouragement" of freedom of belief and association, but also *directly* affect the right to travel which may itself be a First Amendment right;[42] and (4) these statutes make travel not difficult, but impossible.

If the design of the passport statutes, in depriving an individual of the right to travel, is to prevent him from making statements abroad critical of or embarrassing to our policies, or offensive to our political taste, they are the very type of legislation the First Amendment forbids. *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Near* v. *Minnesota*, 283 U.S. 697 (1931).[43] If the statutes bar travel on account of "political affiliations and beliefs," they are expressly condemned in *Douds*: "[such] circumstances

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[41] One of the individuals who has sought in vain for many years to go abroad was recently reported to have sent a "cordial message of greetings" to the Soviet Union which was published in the Communist Party newspaper PRAVDA, and broadcast by the Moscow radio. N.Y. TIMES, Jan. 2, 1957, p. 16, col. 6. "Spies and traitors do not usually travel abroad. Rather, they remain inconspicuously at home, as recent unfortunate cases have amply demonstrated." Parker, *op.cit. supra* note 28 at 873.

[42] Wyzanski, *Freedom to Travel*, THE ATLANTIC MONTHLY, Oct. 1952, 66, 68.

[43] *Ibid.*

[are] ordinarily irrelevant to permissible subjects of government action." 339 U.S. at 391. It is most frequently argued, in justification of the power the Secretary claims, that travel of Communists may serve to promote an international conspiracy. Whether, under the *Douds*[44] reasoning, that possibility justifies these regulations and puts to rest the constitutional doubts that arise is open to serious question.

Another alleged reason for abrogating the constitutional right to travel is that the American abroad may not only talk, but may also act in ways that conflict with our policies and interests and tend to cause international incidents. The Secretary of State embodies that reason in § 51.136 of his regulations,[45] which is not invoked in this case.

During a recent visit to the United States by a foreign chief of state at the invitation of the President, an American mayor declared that the guest was unwelcome in his city. That announcement could hardly have been more prejudicial to our foreign relations if the mayor had been abroad when he made it. Yet no one has suggested that he could constitutionally have been prevented from making his announcement. At home our citizens are as free to do lawful acts as they are to speak their minds.

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[44] See also *Communist Party* v. *Subversive Activities Control Board, supra* note 32.

[45] "*Limitations on issuance of passports to certain other persons.* In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States." 22 C.F.R. § 51.136 (Supp. 1957).

The expectation that they may do things abroad which violate no laws is, I think, an insufficient basis for abrogating their right to leave the country.

If it is the fear of *illegal* conduct which purportedly justifies travel restriction, a factor which may tip the constitutional scale is "the availability of more moderate controls than those which the state has imposed." Mr. Justice Frankfurter, concurring in *Dennis* v. *United States*, 341 U.S. 494, 542 (1951), quoting Freund, ON UNDERSTANDING THE SUPREME COURT. There are penal sanctions against the commission or the attempt or conspiracy to commit espionage, sabotage, treason, sedition and subversion.[46] The Internal Security Act deals with conspiracies to do anything which would substantially contribute to the establishment of a foreign-directed totalitarian dictatorship.[47] For persons who become or remain members of the Communist Party with knowledge of its violent objectives, we have the Communist Control Act of 1954.[48] We have statutes dealing with persons who act as agents of a foreign government,[49] or those who have "correspondence" with a foreign government with intent to influence its measures in relation to disputes or controversies with our Government, or to defeat the measures of the United States.[50] Our law even prohibits leaving the country with intent to avoid prosecution or punishment for certain listed offenses, or to avoid giving testimony in certain criminal proceedings.[51] In that they re-

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[46] 18 U.S.C. §§ 371, 791-97, 2151-56, 2381-90.

[47] 50 U.S.C. § 783.

[48] *Id.*, § 843.

[49] 18 U.S.C. § 951.

[50] *Id.*, § 953.

[51] *Id.*, § 1073.

quire proof of criminality and provide trial by jury, these statutes, despite their severe penalties, are more moderate controls than those the Secretary imposes. He claims that the peril involved in the possible machinations of such persons would justify a statute permitting him to deprive them of the right to travel even though he has no evidence which would justify prosecuting them under any of the penal statutes. I think it very doubtful that a statute could constitutionally grant the power to confine citizens to the country in such circumstances.[52]

Section 1732 of 22 U.S.C. (Supp. 1956) calls upon the

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[52] It has been observed that, since the common law attributes to personal liberty, according to Blackstone, "the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclinations may direct," "the distinction between restriction to a jail, to a city, to a state, or to a nation is merely one of degree." Comment, 61 YALE L.J. *supra* note 28, at 190; see also Doman, *op.cit.supra* note 17 at 310.

Constitutional safeguards are "especially necessary where the occasion of detention is fear of future misconduct, rather than crimes committed." Mr. Justice Jackson, dissenting in *Shaughnessy* v. *Mezei*, 345 U.S. 206, 225 (1953). In other legal systems, as Mr. Justice Jackson points out, other considerations may govern. He cites the testimony of Herman Göring at the Nuremburg trials:

> ". . . those who had committed some act of treason against the new state, or those who might be proved to have committed such an act, were naturally turned over to the courts. The others, however, of whom one might expect such acts, but who had not yet committed them, were taken into protective custody, and these were the people who were taken to concentration camps. . . . Likewise, if for political reasons, . . . someone was taken into protective custody, that is, purely for reasons of state, this could not be reviewed or stopped by any court." *Id.* at 225-26 n. 8.

President to "use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release" of an American citizen "unjustly deprived of his liberty by or under the authority of any foreign government." The majority says that since "an American with Communist affiliations" who gets into trouble abroad through his "political indiscretion" may invoke this statute, the Secretary of State must have the power to prevent the citizen from going abroad. But the American who becomes embroiled with foreign authorities can only request the aid of his Government; he cannot compel it. *United States ex rel. Keefe* v. *Dulles*, 94 U.S. App.D.C. 381, 384-85, 222 F.2d 390, 393-94 (1954), *cert. denied*, 348 U.S. 952 (1955).

That the purported need to confine citizens to the country is claimed to spring from emergency conditions does not dispense with their constitutional rights.[53] Mr. Justice Jackson pointed out in his concurring opinion in *Youngstown Sheet & Tube Corp.* v. *Sawyer*, 343 U.S. 579, 649-50 (1952):

> The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emer-

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[53] The Emergency Detention Act of 1950 (Title II of the Internal Security Act), to deal with "fifth column" problems, authorizes the President, in time of invasion, declared state of war or insurrection in aid of a foreign enemy, to proclaim an "Internal Security Emergency" and to apprehend and detain persons as to whom there is reasonable ground to believe that they "probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." 50 U.S.C. §§ 812, 813, 64 STAT. 1021 (1950). The original bill, S. 4130, 81st Cong., 2d Sess. (1950), had contained provisions authorizing detention during such "cold war" emergencies as an "imminent invasion" or a congressionally declared emergency, but these provisions were eliminated because of doubtful constitutionality. Note, *The Internal Security Act of 1950*, 51 COL.L.REV. 606, 651 (1951).

gency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.

The constitutional questions I have discussed are, in my view, not before us for decision. I mention them, as the Supreme Court said in *Ex parte Endo*, 323 U.S. 283, 299-300 (1944), " . . . not to stir the constitutional issues which have been argued at the bar but to indicate the approach which [I] think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. . . . We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

III.

The President's Inherent Power

The Secretary of State has always treated it as a matter within his own discretion whether he would give a travelling citizen a document surrounding him with the aura of this Government's protection and commending him to other governments. In *Shachtman* we noted the authorities "which have recognized a great breadth of Executive authority and discretion" in this regard.[54] But, we pointed out: "Now it is unlawful for a citizen to travel to Europe and impossible to enter European countries without a passport."[55] The question is whether the

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[54] 96 U.S.App.D.C. at 289, 225 F.2d at 940.

[55] 96 U.S.App.D.C. at 290, 225 F.2d at 941.

Executive has power, by withholding a passport, to confine a citizen within the United States. The Constitution grants no such power. But the Secretary purports to find it in "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . ." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

Numerous cases both before and after *Curtiss-Wright* support the proposition that the President has broad powers in the field of foreign relations. But there is a great gulf between the powers involved in those cases and the power the Secretary claims here. Those cases all relate in some direct fashion to the Executive's traditional power to do things which depend upon negotiations with foreign sovereignties or which bear directly upon our relations with foreign governments. What the Court upheld in *Curtiss-Wright* was the President's "power to negotiate with foreign governments."[56] It sustained delegation to the President of the function of declaring an embargo of munitions sales, because the function was to be exercised "after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as [the President] may deem necessary . . . ."[57] The other cases have recognized that it is for the Executive or the Executive with Congress, free from judicial interference, to deal with such matters as recognition of for-

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[56] Mr. Justice Clark concurring in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 661 n. 3. See the authorities collected in *Z & E Assets Realization Corp.* v. *Hull*, 72 App. D.C. 234, 114 F. 2d 464 (1940).

[57] 48 STAT. 811 (1934).

eign governments,[58] assessment of treaty obligations,[59] resolution of disputed sovereignties,[60] acquisition of new lands,[61] exclusion[62] or expulsion[63] of aliens, imposition of emergency controls over alien property,[64] establishment of an international war crimes tribunal,[65] allocation of an international air route,[66] or creation of an international "Mixed Claims Commission."[67] None of the

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[58] *United States* v. *Palmer*, 3 Wheat. 610, 633-34 (1818); *Jones* v. *United States*, 137 U.S. 202 (1890); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918); *United States* v. *Belmont*, 301 U.S. 324, 330 (1937); *United States* v. *Pink*, 315 U.S. 203, 229 (1942); *Latvian State Cargo & Passenger S.S. Co.* v. *McGrath*, 88 U.S.App.D.C. 226, 188 F.2d 1000, *cert. denied*, 342 U.S. 816 (1951).

[59] *Ware* v. *Hylton*, 3 Dall. 199, 260 (1796); *Doe* v. *Braden*, 16 How. 635, 657 (1853); *Terlinden* v. *Ames*, 184 U.S. 270 (1902); *Ivankevic* v. *Artukovic*, 211 F.2d 565, 573 (9th Cir. 1954).

[60] *Foster* v. *Neilson*, 2 Pet. 253, 307-09 (1829); *Williams* v. *The Suffolk Ins. Co.*, 13 Pet. 414 (1839); *In re Cooper*, 143 U.S. 472 (1892); *The Kodiak*, 53 Fed. 126 (D.Alaska 1892).

[61] *Wilson* v. *Shaw*, 204 U.S. 24 (1907); Mr. Justice Frankfurter, dissenting in *United States* v. *California*, 332 U.S. 19, 45 (1947).

[62] *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950).

[63] *Carlson* v. *Landon*, 342 U.S. 524, 534 (1952); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587-90 (1952).

[64] *United States* v. *Von Clemm*, 136 F.2d 968, 970 (2d Cir. 1943).

[65] Mr. Justice Douglas, concurring in *Hirota* v. *Shaughnessy*, 338 U.S. 197, 208 (1949).

[66] *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948).

[67] *Z & F Assets Realization Corp.* v. *Hull*, 72 App.D.C. 234, 114 F.2d 464 (1940), *affirmed*, 311 U.S. 470 (1941).

"foreign affairs" cases, it has been observed, "involved a situation where the Executive action was specifically directed at restraining the freedom of a particular individual." [68] Chief Justice Marshall, describing those Executive powers which are beyond judicial control and citing the foreign affairs power as an example, said: "The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive." [69] *Marbury* v. *Madison*, 1 Cranch 137, 166 (1803). A characteristic of the political power which is to be exercised free of judicial interference is its "lack of satisfactory criteria for a judicial determination." *Coleman* v. *Miller*, 307 U.S. 433, 454-55 (1939).[70] By this test I think it clear that the

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[68] Comment, 61 YALE L.J. at 187. The *Chicago & Southern Air Lines* case, *supra* note 66, is not an exception. The Court there held that the President's selection of one applicant over another for an international air route was not to be interfered with, because "both as Commander-in-Chief and as the Nation's organ for foreign affairs, [he] has available intelligence services whose reports are not and ought not to be published to the world." 333 U.S. at 111. "The Court evidently was assuming that any secret information the President may have relied upon was in the nature of legislative facts and not adjudicative facts—that the information pertained to international relations and not to qualifications of the particular applicants. . . . Thus an applicant for a license is entitled to a trial type of hearing on issues of fact concerning his qualifications but not necessarily on issues of fact concerning need for the service or conditions in the territory to be served." Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV.L.REV. 193 at 264, 275 (1956).

[69] That the executive power with respect to passports is not of this conclusive character was settled in *Perkins* v. *Elg*, 307 U.S. 325, 349-50 (1939).

[70] See also the *Chicago & Southern Air Lines* case, *supra* note 66, at 111.

wer the Secretary asserts here is not a political power.[71] The Secretary finds authority to abridge the right to avel in what *Curtiss-Wright* recognized as an inherent ecutive power to 'deal' with "a situation entirely external to the United States, and falling within the category of foreign affairs . . . ." 299 U.S. at 315. Extending to internal affairs the President's inherent power over ternal affairs has dangerous implications.[72] Those im-

[71] "The validity of restrictions on the freedom of movement of particular individuals, both substantively and procedurally, is precisely the sort of matter that is the peculiar domain of the courts." Comment, 61 YALE L. J. at . The Secretary's position that "the issuance and denial passports is within the field of conducting foreign policy" s been described by one commentator as "[a] strange, d to this writer's knowledge, unique position among the untries with democratic and constitutional background." oman, *op.cit. supra* note 17, at 309.

[72] Madison wrote to Jefferson in 1798:

> "The management of foreign relations appears to be the most susceptible of abuse of all the trusts committed to a Government, because they can be concealed or disclosed, or disclosed in such parts and at such times as will best suit particular views; and because the body of the people are less capable of judging and are more under the influence of prejudices, on that branch of their affairs, than of any other. Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad." Padover, THE COMPLETE MADISON (1953) 257-58.

Mr. Justice Jackson, concurring in *Youngstown Sheet & ube Co. v. Sawyer*, 343 U.S. at 642, declared:

> ". . . no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."

plications have caused some authorities to shrink from the inherent power doctrine as from something "revolutionary and subversive of our constitutional system";[73] or to anticipate from it a carry-over to our national government of all the royal prerogatives which ancient common law associated with the foreign affairs powers of the King of England;[74] or to fear that it "would, at a stroke, equip the Federal Government with every power possessed by any other sovereign State."[75] In our con-

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[73] Patterson, *In re the United States* v. *The Curtiss-Wright Corporation*, 22 TEXAS L.REV. 286 (1944).

[74] Goebel, *Constitutional History and Constitutional Law*, 38 COL.L.REV. 555, 571-72 (1938). In token that his fears are not fanciful, Professor Goebel cites *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276-77 (1855), where Mr. Justice Curtis, in upholding the right of the Solicitor of the Treasury Department to proceed by distraint, without judicial process, against the property of a defalcating customs collector, reasoned that the taking was not without due process of law because at common law the Exchequer could use the writ of *extendi facias* to seize the "goods of the King's debtor . . . without requiring any previous inquisition . . . ."

[75] 1 Willoughby, THE CONSTITUTION OF THE UNITED STATES 92 (2d ed. 1929); see also Leviton, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L. J. 467, 493 (1946). See the concurring opinion of Mr. Justice Jackson in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 641, replying to the Government's argument that the vesting of "The Executive Power" in the President is a grant of all possible executive power: "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image." One of the evils denounced in the Declaration may have been the King's attempt to prevent emigration to the colonies. Note, 41 GEO.L.J., *supra* note 28, at 70. Even in the earliest co-

plex world there are very few purely internal affairs. Foreign problems cast their shadows on the domestic scene and internal events influence foreign policy. The Department of State has declared that "There is no longer any real distinction between 'domestic' and 'foreign' affairs."[76] If that is so, the inherent power doctrine could produce an extension of the executive power beyond any limits heretofore conceived; and the President, through his Secretary of State could preempt the internal security functions of Congress.

But the Supreme Court has confined the inherent foreign affairs power within accountable limits.[77] I am convinced from my review of the authorities and my study of history that the power here claimed by the Secretary is beyond those limits. *Curtiss-Wright* declares that an extra-constitutional foreign relations power passed to the President from the British Crown. To say that *all* the powers of the Crown devolved upon the President would,

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lonial period, Charles I, in the exercise of the royal prerogative to confine the subject to the realm, issued a proclamation against taking passage to America, because some who were going were "'idle and refractory persons' who wished to live out of reach of authority." 10 Holdsworth, HISTORY OF ENGLISH LAW 390 (1938).

[76] OUR FOREIGN POLICY, Department of State Publication 3972, General Foreign Policy Series 26, Sept. 1950, p. 4.

[77] *Supra notes* 58-67. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 487, the Court said, dealing with the analogous question of the extent of the President's military power: "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities." See also text at notes 95-97, *infra*.

of course, be inconsistent with the basic principle that every branch of the national government has only a limited power, and *Curtiss-Wright* does not even suggest such a thing.[78]

The British Crown had a prerogative to confine subjects to the realm by writs *ne exeat regno*.[79] But it was not one of the prerogatives which devolved upon our President. It had its roots in the Crown's earliest constitutional controversies with the clergy[80] and the barons.[81] By the year 1382, restraints against clerics and notables were relaxed, but a prohibition was placed upon unlicensed departure from the realm by the common subjects of the King. 5 Rich. II, c. 2, §§ 6, 7. In 1607

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[78] A specific royal prerogative, in its devolution upon our national government, may be divided between the executive and legislative branches. See, *e.g.*, 10 OPS. ATT'Y GEN. 452 (1863).

[79] See Note, 41 GEO. L.J. at 64-70.

[80] From the struggles of Henry II with Thomas à Becket emerged, in 1164, the fourth article of the Constitutions of Clarendon prohibiting ecclesiastics from leaving the realm without the king's permission.

[81] John's struggle with the barons culminated, in 1215, in Magna Carta which provided in c. 42:

> "It shall be lawful in future for anyone (excepting always those imprisoned or outlawed in accordance with the law of the kingdom, and natives of any country at war with us, and merchants, who shall be treated as [otherwise] provided) to leave our kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy —reserving always the allegiance due to us."

This provision did not survive John. It was omitted from the confirmation of the Charter in 1217 and the definitive proclamation by Henry III in 1225 which is the Charter's present statutory form. *Supra* note 79 at 67-68; Goebel, *op.cit. supra* note 74, at 573-74 n. 51.

that prohibition was repealed, 4 James I, c. 1, so that ostensibly freedom of travel was restored, except to persons covered by special statutes.[82] It is undeniable, however, that the Crown continued to exercise its prerogative to confine subjects to the realm, at least until about one hundred years before our Revolution.[83]

The manner in which British kings employed *ne exeat* was in some ways strikingly similar to our State Department's present policies and practices. The writ, first used "to hinder the clergy from going to Rome . . . ., was afterward extended to laymen machinating and concerting measures against the state . . . . ."[84] At one time the class confined to the realm included "all archers and artificers, lest they should instruct foreigners to rival us in their several trades and manufactures."[85] Bacon says the writs were issuable "in respect of attempts prejudicial to the King and State; (in which case the Lord Chancellor will grant them upon prayer of any of the principal Secretaries, without cause, or upon such information as his Lordship shall think of weight) . . . ."[86]

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[82] Largely affecting children sought to be sent abroad for Catholic education. *Supra* note 79, at 69.

[83] Goebel, *op.cit. supra* note 74, at 573-74 n. 51; 10 Holdsworth, *op.cit. supra* note 75, at 391-92.

[84] 1 Blackstone, COMMENTARIES (Wendell's ed. 1854) 266 n. 22.

[85] *Id.* at 265-66.

[86] Ordinances, No. 89, quoted in Beames, NE EXEAT REGNO (1st Amer.ed., 1821) 17. In form, the writ commanded the subject "that he go not beyond the seas or out of the realm without a license" upon the stated ground that "we are given to understand that you design to go privately into foreign parts and intend to prosecute there many things prejudicial to us . . . ." Provision was made whereby the subject could apply to Chancery for a license. Parker, *op.cit. supra* note 28, at 867.

The power to confine subjects to the realm, though it had fallen into disuse,[87] was still part of the king's prerogative when we became an independent nation. The draftsmen of our Constitution were familiar with it through Blackstone, "that handbook of the American revolutionary." [88]

Blackstone divided the prerogatives of the Crown into two general categories: those relating to "intercourse with foreign nations"; and those relating to "domestic government and civil polity." 1 COMMENTARIES (Wendell's ed. 1854) 252. It is the first branch of the royal prerogative to which *Curtiss-Wright* refers and upon which the Secretary here relies.

"With regard to foreign concerns," says Blackstone, "the king is the delegate or representative of his people.

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[87] The writ *ne exeat* has continued to be employed only as a private equitable remedy to prevent flight of creditors. *Supra* note 85; Parker, *op.cit. supra* note 28 at 867-68. In its aspect as a private equitable remedy, it was imported into our law. 1 STAT. 334 (1793); JUDICIAL CODE § 261, 36 STAT. 1162 (1911), 28 U.S.C. § 376 (1940); now covered by Rule 64, FED.R.CIV.P., see Notes of Advisory Committee. The royal prerogative still exists in England, but whether it may be exercised in time of peace is doubtful. Note, 41 GEO.L.J. at 70.

[88] Rutland, THE BIRTH OF THE BILL OF RIGHTS 11 (1955). "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it." *Schick* v. *United States*, 195 U.S. 65, 69 (1904). Professor Crosskey refers to the Commentaries as "that great 'best-seller' of the eighteenth century" and points out that some of the members of the Constitutional Convention were on the subscription list of the original American edition in 1772. POLITICS AND THE CONSTITUTION, Vol. 1, p. 411, and Vol. 2, p. 1326, n. 3 (1953).

. . . . In the king, therefore, as in a center, all the rays of his people are united . . . ." [89] *Ibid.* The king's foreign affairs prerogative included the following components: (1) "the sole power of sending embassadors to foreign states, and receiving embassadors at home," *id.* at 252-56; (2) making "treaties, leagues and alliances with foreign states and princes," *id.* at 256; (3) "making war and peace," *id.* at 256-57; (4) issuing "letters of marque and reprisal," *id.* at 257-59; and (5) granting "safe conducts" or "passports" to *aliens* coming to the realm, *id.* at 259-60.[90]

The foreign affairs prerogative *did not include the*

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[89] Cf. John Marshall, in an address to the House of Representatives in 1800: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 ANNALS OF CONGRESS, 6th Cong., 1st Sess., col. 613 (1800).

[90] The "passports" referred to in this part of the prerogative are merely "safe conducts" which were issued to visiting strangers "under the king's sign-manual," rather than by one of "his embassadors abroad." *Id.* at 259. This part of the foreign affairs prerogative has been carried over to our Government. See *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950): "The exclusion of aliens is a fundamental act of sovereignty . . . [which] stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." See also *Carlson* v. *Landon*, 342 U.S. 524, 534 (1952); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587-89 (1952); and *Galvan* v. *Press*, 347 U.S. 522, 530 (1954). The majority's reliance upon *Galvan* to support a power to control the movements of *citizens* is thus misplaced. See text at note 36 *supra*.

So far as the rest of the royal prerogative over foreign affairs is concerned, the power to make war and to issue letters of marque and reprisal were confined by our Constitution to the legislative branch, and the sending of ambassadors to and making of treaties with other nations were given to the President, but with a role preserved for the Senate.

power to confine subjects to the realm. This was p
of the *domestic prerogative*, having to do with *milit*
affairs. Id. at 265. Blackstone says, *id.* at 262:

> The king is considered . . . as the generalissi
> or the first in the military command, within the ki
> dom. The great end of society is to protect
> weakness of individuals by the united strength of
> community; and the principal use of government is
> direct that united strength in the best and most ef
> tual manner, to answer the end proposed. Monarch
> government is allowed to be the fittest of any
> this purpose; it follows, therefore, from the very
> of its institution, that in a monarchy the milit
> power must be trusted in the hands of the prince.

And, "because that every man ought of right to def
the king and his realm, therefore the king, at his pleas
may command him by his writ that he go not beyond
seas, or out of the realm, without license . . . ." *Id.* at
Since the king's *ne exeat* power was part of his dom
tic military prerogative, rather than his foreign affa
prerogative, *Curtiss-Wright* lends no support to a the
that the power devolved upon our President.

It is plain that our Constitution, with respect to thi
military, conveyed to Congress most of the powers wh
were the king's prerogative,[91] leaving the President o
the command function. The President's military pow
said Hamilton, "would amount to nothing more than
supreme command and direction of the military and na
forces, a first General and admiral of the Confedera
while that of the British king extends to the *declaring*
war and to the *raising* and *regulating* of fleets and armi
all of which, by the Constitution under considerati

[91] *E.g.*, "to raise and support Armies," "to provide
maintain a Navy," "to make rules for the government a
regulation of the land and naval forces," the various mil
powers, and the authority to legislate with respect to pla
"for the erection of forts, magazines, arsenals, dock-ya
and other needful buildings." Constitution, Art. I, § 8.

would appertain to the legislature." THE FEDERALIST No. 69 (Ford ed. 1898), p. 460.[92] Since the American citizen does not owe the President such a duty of defens as the British subject owes his monarch, there is no basi for implying a grant to the President of the *ne exea* power which might be necessary to enforce such a duty We owe our duties to the nation, not to its chief execu tive.[93]

The notion that the President possesses inherent *mili tary* power to deal with internal affairs involving private rights was disposed of in *Youngstown Sheet & Tube Co* v. *Sawyer*, 343 U.S. 579 (1952). The Court ruled that i could not, "with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from

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[92] Professor Crosskey points out that St. George Tucker a Jeffersonian, in his 1803 edition of Blackstone, noted that "the student c[ould] not fail to have remarked how many of the most important prerogatives of the British crown [had been] transferred *from the executive authority*, in the United States, *to the supreme national council in Congress.*" *Op.cit. supra* note 88 at 415. Crosskey concludes as to the military prerogative: "So, in this whole field in which the powers of the King were so very great—the field of authority from which, if from any, the Convention may have feared a future American monarchy might conceivably arise —the 'supremacy' of Congress was most carefully and amply provided: apart from the bare 'command' in actual action and administration, all the foregoing authorities of the English King, as 'generalissimo,' were specifically transferred to Congress or subjected, in the plainest terms, to Senatorial or Congressional control." *Id.* at 427.

[93] A cognate of the writ *ne exeat* is the writ available to the king to recall a subject to the realm from abroad. *Supra* note 84 at 266. To the extent that this prerogative power passed to our Government, it is lodged not in the President but in Congress. See *Blackmer* v. *United States*, 284 U.S. 421, 437-38 (1932).

stopping production." *Id.* at 587. Mr. Justice Dougla concurring, declared that "our history and tradition reb at the thought that the grant of military power carrie with it authority over civilian affairs." *Id.* at 632. M Justice Jackson added: "That military powers of th Commander in Chief were not to supersede representa tive government of internal affairs seems obvious fro the Constitution and from elementary American history . . . [The President's] command power is not such a absolute as might be implied from that office in a mil taristic system but is subject to limitations consisten with a constitutional Republic whose law and policy making branch is a representative Congress." *Id.* a 644, 645-66.[94]

At the time of *Youngstown* our Armed Forces wer engaged in active combat in Korea. The record befor the Court contained a number of affidavits by high Gov ernment officials, typical of which was that of the Secre tary of Defense, which stated:

> . . . any curtailment in the production of steel eve for a short period of time will have serious effect on the programs of the Department of Defense whic are essential to national security. A work stoppag in the steel industry will result immediately in seri ous curtailment of production of essential weapon and munitions of all kinds; if permitted to continu it would weaken the defense effort in all critical area and would imperil the safety of our fighting men an that of the nation.

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[94] The executive absolutism implicit in the royal preroga tive has its counterpart in modern systems of governmen which, though formally representative, differ from ours i basic philosophy. Thus, under the Venezuelan theory o "cesarismo democratico," the president is "democracy per sonified, the nation made man" and his "influence and powe . . . extend to all levels of government. . . ." Lott, *Execu tive Power in Venezuela*, 50 THE AMERICAN POLITICAL SCI ENCE REVIEW 422, 425, 440 (1956).

Chief Justice Vinson, dissenting, thought "the uncontroverted affidavits in this record amply support the [President's] finding that 'a work stoppage would immediately jeopardize and imperil our national defense.'" *Id.* at 679. He also cited our numerous international undertakings—United Nations, Korea, Truman Plan, Marshall Plan, North Atlantic Treaty Organization and Mutual Security—all of which might be imperilled if the President's seizure were not upheld. *Id.* at 668-72. He found support for the seizure not only in the President's military power and in his foreign relations power, *id.* at 679, 681, but also in the fact that the emergency required emergency action. *Id.* at 668, 708-19. The Court, however, repudiated these views. It held that the seizure of steel mills involved in labor strife was within Congress' "exclusive constitutional authority . . . in both good and bad times." *Id.* at 588-89.

The military power has in the past been argued to be broad enough to subject to court-martial civilians who obstruct the successful prosecution of hostilities.[95] But, as Professor Edmund M. Morgan pointed out: "Every act of treason would, by this reasoning, be punishable by court-martial, and the third section of article III of the constitution would have no field of operation."[96] When, during World War I, legislation was offered to subject all spies to court-martial, on the theory that the whole of the United States was a war zone, President Wilson said: "I think that it is not only unconstitutional, but that in character it would put us upon the level of the very people we are fighting and affecting to despise."[97]

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[95] Winthrop, MILITARY LAW AND PRECEDENTS (2d ed. 1920) 103.

[96] Morgan, *Court Martial Jurisdiction Over Non-Military Persons Under the Articles of War*, 4 MINN.L.REV. 79, 106 (1920).

[97] Rankin, WHEN THE CIVIL LAW FAILS (1939) 138-39.

IV.

Conclusion

My conclusions are that (1) the President has not delegated to the Secretary of State the power to decide which Americans may travel and which may not; (2) neither of the two statutes relied on by the Secretary as a source of such power—22 U.S.C. § 211a and 8 U.S.C. § 1185—grants the power, in terms, either to the President or to the Secretary; (3) a construction of either or both of the statutes as granting the power would conflict with other expressions of congressional policy and would raise constitutional doubts of the utmost gravity, especially to the extent that eligibility is made to depend upon matters of political belief and association; (4) since the power was not conferred by statute, the President does not possess it, for it is not one of the powers inherent in his office.

The broad power to curtail the movements of citizens of the United States, to the extent that our Government possesses it, *is vested in Congress, not in the President.* Travel is being controlled today for purposes of internal security. To call it a matter of foreign relations is mere pretense. Whether our internal security requires the drastic measure of restricting travel and, if so, to what extent and by what criteria and procedures is for Congress to decide. If and when Congress acts, there will presumably be hearings, reports and debates which may serve to limit what Congress elects to do and may help to interpret what it does. The constitutionality of any such measure will, of course, depend on its provisions and the circumstances in which it is enacted.

The question before us is whether the Secretary of State has power to establish such substantive criteria for travel as are here involved. We need not decide and I do not say that there are no circumstances under which the Secretary may restrain a citizen's travel. Whether

he may deny a passport to prevent a flight from justice[98] or in aid of the enforcement of some specific law, *e.g.*, the Universal Military Training and Service Act,[99] are questions that may arise in other cases. In any event, the exercise of such powers would be a far cry from the Secretary's present undertaking.

EDGERTON, *Chief Judge, dissenting:* We have temporized too long with the passport practices of the State Department. Iron curtains have no place in a free world. I think the Secretary should be directed to issue a passport.

"Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by . . . the Constitution." *Williams* v. *Fears*, 179 U.S. 270, 274. We have held that the right to leave the country is an attribute of personal liberty and that restrictions on it "must conform with the provision of the Fifth Amendment that 'No person shall be . . . deprived of . . . liberty . . . without due process of law'." *Shachtman* v. *Dulles*, 96 U.S.App.D.C. 287, 290, 225 F. 2d 938, 941.

But we need not and therefore should not[1] decide any constitutional question. As Judge Bazelon's opinion shows, the President and Congress have not undertaken to delegate to the Secretary the authority he claims. This is very clear when the statutes and executive orders on

[98] Cf. 18 U.S.C. § 1073.

[99] Act of June 24, 1948, 62 STAT. 604, 50 U.S.C. App. §§ 451 *et seq.*

[1] *Peters* v. *Hobby*, 349 U.S. 331, 338.

which he relies are construed narrowly. Delegations of authority must be construed narrowly when a narrow construction avoids serious constitutional questions. *United States* v. *Rumely*, 345 U.S. 41.

The Secretary proposes to continue restricting the personal liberty of a citizen because statements by informants whom the Secretary does not identify have led him to think that if the citizen goes abroad he will do something, the nature of which the Secretary does not suggest, which the Secretary thinks, for reasons known only to him, will be contrary to what, for reasons known only to him, he conceives to be "the national interest". If Congress or the President had undertaken to authorize this, serious constitutional questions would arise. May the government deprive a citizen of his constitutional liberty to go abroad (1) without a jury trial, (2) without a definite standard of guilt, (3) without sworn testimony, and (4) without an opportunity to confront his accusers or know their identity? May it deprive him of this liberty because of the way he has exercised his First Amendment rights of free speech, press, and assembly? Since neither Congress nor the President has undertaken to give the Secretary the authority he claims, we need not consider these constitutional questions.

FAHY, *Circuit Judge, dissenting:* The discretion of the Secretary in issuing passports prior to the enactment in 1941 of 66 Stat. 190, 8 U.S.C. § 1185(b) (1952), see *Shachtman* v. *Dulles*, 96 U.S.App.D.C. 287, 225 F.2d 938, was subject to no clear limitation except that the applicant must qualify as one who owed allegiance to the United States.[1] A passport was in the nature of a political document; one need not have it in order to obtain passage and depart

[1] 32 Stat. 386 (1902), 22 U.S.C. § 212 (1952), which amended 14 Stat. 54 (1866). Under the earlier law only citizens were eligible for passports.

from the United States. So no deprivation of liberty and no justiciable controversy were involved in denial of a passport. But 8 U.S.C. § 1185(b) changed all this. By that statute Congress provided that when the United States is at war or during the existence of any national emergency proclaimed by the President no citizen may lawfully depart from the United States without a valid passport, with exceptions not here pertinent. This was an assertion by Congress of restraint upon travel based upon the war power, coupled with the executive control over passports incident to the conduct of foreign affairs noted in *Shachtman*. The new statute, however, did not enumerate other specific criteria, notwithstanding a passport thenceforth was not merely a political document the denial of which entailed no deprivation of liberty. But I do not think the absence from 8 U.S.C. § 1185(b) of more specific criteria renders nugatory the control in question.[2] The statute explicitly limits the control to a time of war or of a presidentially proclaimed national emergency, and to passports. Control related to the war powers and to the conduct of foreign affairs is thus plainly intended. In order to be validly exercised the powers thus invoked, though subject to the Constitution, are not held to the same degree of legislative or other specificity as are those of government generally. Moreover, we do not have here, as in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, an attempted exercise of executive authority alone; the problem is more like that involved in *Hirabayashi* v. *United States*, 320 U.S. 81, where there was a combination of legislative and executive authority. Here Congress seeks to control travel and to that end

[2] It seems manifest that control was attempted. No longer was there to be merely the ascertainment of the obligation or not of allegiance. Before 8 U.S.C. § 1185(b) was enacted this qualification was the sole essential. The enactment, therefore, was a definite authorization by Congress of control of the travel of some who had that qualification.

to enlarge the significance of executive control over passports, in time of war or national emergency. When the Act of Congress is considered with the authority of the executive I think the courts would not be justified in entirely nullifying all control other than that incident to ascertainment by the issuing authority of whether or not the applicant owes allegiance to the United States. I am reassured in this view by the fact that the passport to be issued need be only a simple pass or permit which enables the possessor to depart lawfully from the United States, and no more; and, furthermore, the control is always limited by the requirements of the Due Process Clause. *Shachtman v. Dulles*, *supra*; *Bauer v. Acheson*, 106 F. Supp. 445. Upon these considerations I would interpret the control enacted by Congress as valid when exercised consistently with due process to prevent the reasonable likelihood of harm to our national defense or to the conduct of our foreign affairs. This gives valid content to the Act of Congress, a result to be preferred when reasonably possible, to a holding that Congress has entirely failed in its intended purpose. *Cf. United States v. Rumely*, 345 U.S. 41, and *Ullman v. United States*, 350 U.S. 442.

We come then to the question whether, taking the above approach, the denial of appellant's application is consistent with due process and satisfies the criteria referred to. In reaching this question I construe the factual situation as amounting to an actual denial of appellant's application on the ground that he refused to file a statement in accordance with section 51.142 of the Passport Regulations, 22 C.F.R. § 51.142 (Supp. 1957). The denial flows from the regulation and not from an independent conclusion of the Secretary with respect either to appellant or to any particular geographical area. The information sought by the regulation is relevant to the criteria by which the Secretary must be guided; for travel abroad at this time by persons who owe allegiance

to the United States but who are or have been members of the Communist Party may reasonably be deemed to be related to the national defense and to the conduct of foreign affairs. It does not follow, however, that refusal by the applicant to furnish this relevant information, without more, brings denial of his application into conformity with due process. It must be borne in mind that the denial deprives him of liberty to depart from the United States, a right which he has unless lawfully deprived thereof. In *Garner* v. *Los Angeles Board*, 341 U.S. 716, the relevant information which the Court held the applicant must supply was required by law, and was with respect to retaining State employment. These two factual differences are enough I think to distinguish that case from this one. Not only has Congress not specified here that the information refused must be furnished as a condition to obtaining a passport, but the liberty to travel is on a different footing from a desire to retain State employment. In the one case there is the taking away of an existing liberty; in the other there is State control over the qualifications of its employees. And the degree of restraint involved, as well as the nature of the liberty restrained, are pertinent in determining the sufficiency of the reason assigned for the restraint. Furthermore, the failure of appellant to furnish the information may have been in good faith reliance upon the First Amendment, *cf. Konigsberg* v. *State Bar of California*, 353 U.S. 252, or for other good faith reasons, such as fear of prosecution for making a false statement. Of course the reason may have been that to answer truthfully would have disclosed Communist Party membership and thereby automatically have caused the application to be denied under section 51.135(a) of the Regulations. But we are not required to assume this reason, or now to decide the validity of denial of a passport based on such assumption. It is true, as pointed out in Judge Washington's concurring opinion,

that Congress has declared that travel of Communist members facilitates communication and is a prerequisite for carrying on of activities to further the purposes of the Communist movement. The Secretary cannot be required to assume that a real Communist Party member who is a citizen of or otherwise owes allegiance to the United States, can be relied upon to adhere to his obligation of citizenship when it conflicts with the responsibility he has assumed by Party membership. For this reason a general uncertainly as to the conduct of those involved in Communist membership or discipline has a justifiable place in considering passports. But such general uncertainty is not a substitute for a decision by the issuing authority where, in any event, Party membership or discipline is not shown. An applicant who refuses to file the statement required by section 51.142 may have no derogatory information to supply, or he may need to depart for personal or other reasons unrelated to some possible Communist involvement. Yet the Secretary, though satisfied to either effect, could not permit the departure. Thus to create a general restriction on travel by those who refuse the information, without more, is not reasonable. It prohibits travel by an individual whose own reason to depart does not come within the criteria upon the basis of which the Secretary may validly refuse him permission to depart. The intended travel might be wholly unrelated to any problem of national defense or foreign affairs. To avoid this difficulty a conclusion should be reached by the issuing authority in the individual case, or with respect to the territorial area involved, on the question whether the travel would be reasonably likely to be detrimental to the national defense or to the conduct of our foreign affairs. While the issuing authority may take into consideration the refusal of the applicant to comply with section 51.142, due process is not afforded in peacetime by applying to an individual case the general restriction referred to when there is op-

portunity for a particular judgment. The exigencies of the situation do not require a blanket rule which, for administrative convenience or otherwise, obviates the necessity of a judgment reached by the issuing authority in the individual case. We are not at war. There is a presidentially proclaimed period of national emergency, but we must not construe the authority to be exercised as equal to that available in wartime. To bring the regulation of travel within the requirements of substantive due process, *Shachtman* v. *Dulles*, *supra*, calls I think for the exercise by the issuing authority of its own decisional processes to a greater degree than inheres in denial of a passport through the self-executing effect of an applicant's refusal to supply the information sought by section 51.142 of the Regulations.

Being of the views thus expressed I would reverse and remand, with direction that the case be returned by the District Court to the Secretary for reconsideration consistently with these views and with procedures required by our decision in *Boudin* v. *Dulles*, 98 U.S. App. D.C. 305, 235 F.2d 532.

[fol. 247] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957.

C.A. 5042-55

No. 13,317

WALTER BRIEHL, Appellant,

v.

JOHN FOSTER DULLES, Secretary of State, Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher and Bastian, Circuit Judges, sitting en banc.

JUDGMENT—June 27, 1957

This cause came on to be reheard en banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: June 27, 1957.

Per Curiam.

Circuit Judges Prettyman, Miller, Washington, Danaher and Bastian vote to affirm.

Chief Judge Edgerton and Circuit Judge Bazelon vote to reverse.

Circuit Judge Fahy votes to remand to the District Court with instructions to remand to the Secretary.

Circuit Judge Burger took no part in the consideration or decision of this case.

Circuit Judge Prettyman filed an opinion in which Circuit Judges Wilbur K. Miller, Danaher and Bastian concur.

Circuit Judge Washington filed an opinion concurring in the result.

Circuit Judge Bazelon filed a dissenting opinion in which Chief Judge Edgerton concurs.

Chief Judge Edgerton also filed a separate dissenting opinion.

Circuit Judge Fahy filed a dissenting opinion.

[fol. 251] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 253] SUPREME COURT OF THE UNITED STATES
No. 481, October Term, 1957

ROCKWELL KENT and WALTER BRIEHL, Petitioners,

v.

JOHN FOSTER DULLES, Secretary of State

ORDER ALLOWING CERTIORARI—November 25, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U.S.
FILED
SEP 18 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 481

ROCKWELL KENT
and
WALTER BRIEHL,
Petitioners,

v.

JOHN FOSTER DULLES,
Secretary of State.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1957

No.

ROCKWELL KENT

and

WALTER BRIEHL,

Petitioners,

v.

JOHN FOSTER DULLES,
Secretary of State.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Rockwell Kent and Walter Briehl respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia, entered in the above entitled cases on June 27, 1957, affirming summary judgments against petitioners entered in the United States District Court for the District of Columbia in suits brought to enjoin the Secretary of State from denying passports to petitioners.

The cases were argued together in the court below. The opinion in the *Kent* case incorporates by reference that in the *Briehl* case. Since the cases involve identical questions, a single petition is filed under this Court's Rule 23(5).

Opinions Below

The opinions in the Court below have not yet been reported. They are separately presented pursuant to this Court's Rule 23(1)(i). The opinions of the District Court were not reported; they are printed at B.R. 71-72 and K.R. 84.[1]

Jurisdiction

The judgments of the Court of Appeals were entered on June 27, 1957 (Appendix B, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether the Secretary of State is authorized by law to condition the issuance of passports to American citizens on their meeting political standards devised by him.

2. Whether the Secretary's passport regulations (22 C. F. R. §§ 51.135-51.170, hereinafter referred to as "the Passport Regulations"), are invalid because they are not authorized by Congress and because they conflict with controlling statutes, *viz.*, the Act of June 14, 1902, c. 1088, § 2, 32 Stat. 386, 22 U. S. C. 212; section 6 of the Internal Security Act of 1950, 64 Stat. 993, 50 U. S. C. 785; and the Expatriation Act of 1868, 15 Stat. 223-224, R. S. § 1999.

3. Whether the Passport Regulations, on their face and as applied to petitioners, abridge First Amendment rights of speech, belief and association; constitute a bill of attainder and an *ex post facto* law, in violation of Article I,

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[1] The Record in Dr. Briehl's case is referred to as "B.R. . .."; that in Mr. Kent's case as "K.R. . . .". References herein to the "Opinion" are to the opinions in the Court below in the former case.

section 9 of the Constitution; and deprive petitioners of their rights of travel and to due process under the Fifth Amendment.

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions involved are Article I, Sections 8(3) and 9(3); Article IV, Section 2(1); and the First, Fifth and Ninth Amendments to the Constitution. The statutes involved are the Act of July 3, 1926, c. 772, § 1, 44 Stat. 887, 22 U. S. C. 211(a); the Act of June 14, 1902, c. 1088, § 2, 32 Stat. 386, 22 U. S. C. 212; the Internal Security Act of 1950, § 6, 64 Stat. 993, 50 U. S. C. 785; the Immigration and Nationality Act of 1952, § 215(a), 66 Stat. 190, 8 U. S. C. 1185; and the Expatriation Act of 1868, 15 Stat. 223-224, R. S. § 1999. These statutes and the pertinent provisions of the Passport Regulations are reproduced in Appendix A, *infra*.

Statement of the Case

1. The Proceedings in the State Department

These cases arise as a result of passport applications rejected by the Secretary of State under his Passport Regulations of August 28th, 1952. Those regulations provide, in part, that no passport shall be issued to persons (a) "who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion * * * that they continue to act in furtherance of the interests and under the discipline of the Communist Party"; (b) who engage in activities which support the Communist movement * * * as a result of direction, domination or control exercised over them by the Com-

munist movement"; or (c) who, knowingly and wilfully, "are going abroad to engage in activities which will advance the Communist movement" (§ 51.135). The regulations further provide that any passport applicant "may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party" (§ 51.142). At the present time, with the exception of travel to certain countries in the Western Hemisphere, a citizen cannot lawfully depart from or enter the United States without a passport (8 U. S. C. 1185; Proc. No. 3004, 67 Stat. c. 31).

a. *Dr. Walter Briehl*

Dr. Walter Briehl, a psychiatrist whose professional work requires his attendance at international conventions on mental health, obtained and used a passport in 1953 for that purpose (B.R. 23). In 1955, he applied for its renewal to enable him to attend similar medical conventions in Geneva and Istanbul (B.R. 3). The Director of the Passport Office disapproved his request "tentatively", under § 51.135 of the Passport Regulations, on the following grounds:

> "* * * it is alleged that you were a member of the Los Angeles County Communist Party; that you were a member of the Bookshop Association, St. Louis, Missouri; that you held Communist Party meetings; that in 1936 and 1941 you contributed articles to the Communist Publication 'Social Work Today'; that in 1939, 1940 and 1941 you were a sponsor to raise funds for veterans of the Abraham Lincoln Brigade in calling on the President of the United States by a petition to defend the rights of the Communist Party and its members; that you contributed to the Civil Rights Congress bail fund to be used in raising bail on behalf of convicted Communist leaders in New York City; that you were a member of the Hollywood Arts, Sciences and Pro-

fessions Council and a contact of the Los Angeles Committee for Protection of Foreign Born and a contact of the 'Freedom Stage, Incorporated'" (B.R. 13-14, 22-24).

Dr. Briehl was told by the Passport Office that he would have to execute a sworn statement as to "whether you are now or ever have been a Communist" and "explain" his connections with the organizations referred to and "any other Communist front organizations with which you may have been associated" (B.R. 19-20). He appeared with counsel at an informal "hearing" in the Passport Office (B.R. 29-52). Neither his statement of the professional purposes of his travel nor his citizenship was questioned by the Passport Office. Nor did that Office comply with his request that evidence against him, if such there were, be presented.

Dr. Briehl refused to submit to an examination with respect to his political associations on the grounds of relevance and constitutional right (B.R. 46-47). The Secretary of State thereupon declined to issue a passport (B.R. 60-64).

b. *Mr. Rockwell Kent*

Mr. Rockwell Kent, an artist 75 years of age, had for some years used passports for travel abroad. In June, 1955, he applied for a passport. That application was tentatively denied by the Director of the Passport Office on the ground that:

> "* * * it has been alleged that you were a Communist.
>
> "The Department has concluded that your case also falls within the scope of sub-sections (b) and (c) of Section 51.135 of the Regulations. It is the opinion of the Department that the evidence indicates on your part a consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line for an extended period of time" (K.R. 22-23).

The Director's letter of tentative denial relied on articles and speeches by Mr. Kent and on his connections with some organizations on the Attorney General's list; it charged that he had petitioned the Attorney General "criticizing the use of paid informers", had "sought the repeal of the Walter-McCarran Law" and had "urged release on bail of Steve Nelson who was convicted of sedition in Pennsylvania" (K.R. 25).[2] Mr. Kent was told to submit an affidavit stating "whether you are now or ever have been a member of the Communist Party, and it should include a complete explanation of your alleged Communist activities as set forth in a previous letter from the Department to you" (K.R. 31).

On August 2, 1955, Mr. Kent applied again for a passport. He stated under oath that the sole purpose of his proposed travel was "prosecution of profession and pleasure" (K.R. 39). At the informal "hearing" in the Passport Office he was the only witness who appeared. The Passport Office representatives offered into evidence his recent autobiography, *It's Me O Lord*, for the purpose of showing that Mr. Kent had joined many organizations on the Attorney General's list; and they introduced evidence that he had asserted his constitutional privilege before the McCarthy Committee (K.R. 56).

Mr. Kent declined to submit a statement under oath "as to membership in the Communist Party or membership in the Communist-front organizations" (K.R. 59). When asked to submit evidence of conduct "antagonistic to the Communist Party, that showed that he did something not along the line" (K.R. 62-63), Mr. Kent responded:

> "I think that I could very easily think of a number of things that I have done and principles I have ad-

[2] The letter also charged that Mr. Kent had visited Czechoslovakia, Finland and Russia in 1950, when his passport was not valid for travel to these countries. However, the Secretary has elsewhere conceded that such passport limitations do not affect the legality of such travel (Dept. State Press Release No. 241, May 1, 1952).

> vocated that they wouldn't like one single bit. I would have to think about them. Because I have not been concerned * * * whether * * * what I believe in is believed by others, by the Communists or what. But, I'm not going to say that because, as I said before, I consider this irrelevant" (K.R. 62).

The Passport Office declined to give him a passport on the basis of the allegations against him, stating:

> "At the informal hearing, at which you were represented by counsel, you declined to furnish a statement, subscribed and sworn to under oath or affirmation with respect to your present or past membership in the Communist Party, insisting that such a statement was irrelevant. Moreover, you refused to discuss or furnish any information concerning your alleged affiliation with Communist-front organizations or other alleged Communist activities on the same ground. These allegations, which you have neither refuted nor explained, were detailed in my letter to you of June 29, 1955" (K.R. 73).

2. The Proceedings in the Courts below

Petitioners instituted separate lawsuits in the district court for decrees (1) adjudging that they are entitled to passports and (2) directing that the passport in Dr. Briehl's case be renewed and one in Mr. Kent's case be issued. Jurisdiction was invoked under the Administrative Procedure Act, 5 U. S. C. 1009; the Declaratory Judgment Act, 28 U. S. C. 2201 and D. C. Code §§ 11-305, 11-306. Petitioners moved for preliminary injunctions and for summary judgments upon their complaints and supporting affidavits; and the Secretary of State moved for judgments on the pleadings, or alternatively, for summary judgments upon supporting affidavits.

The District Court granted the Secretary's motions for summary judgment and dismissed the complaints, basing its decisions on petitioners' refusal to execute the affidavits required by the Department (B.R. 71-72; K.R. 84-85).

The Court of Appeals, after hearing the cases *en banc*, following earlier oral argument before a division of the Court, affirmed the judgments of the District Court. There was no opinion of the court as such; the eight Judges rendered five separate opinions in the *Briehl* case and reaffirmed their views in the *Kent* case. Those opinions were as follows:

(1) Judge Prettyman, whose opinion was concurred in by Judges Miller, Danaher and Bastian, was of the view that there is a constitutional right to travel under the Fifth Amendment and that "the restrictions imposed by these [passport] regulations and the underlying statutes upon the right to travel are impingements upon that phase of liberty and indirectly upon the exercise of First Amendment rights" (Opinion, p. 22). Balancing "private right against public requirement" (*ibid.*), however, he concluded that "[in] the international situation of the present, the reasonable requirements of national security and interest and the delicate characteristics of foreign relations outweigh the needs or desires of an individual to travel" (*ibid.*). It was his opinion that the Passport Regulations are authorized by the foreign affairs' power of the President and by the statutes which authorize the Secretary to issue passports (22 U. S. C. 211a) and which make travel without a passport illegal (50 U. S. C. 1185); and are not in conflict with section 6 of the Internal Security Act of 1950 (Opinion, pp. 16,17).

(2) Judge Washington, in a separate opinion, concurring only in the result, declined to decide whether past or present membership in the Communist Party in itself would be sufficient ground to support denial of a passport, or "such questions as whether the Secretary's regulations are in every particular valid, whether he is justified in using confidential information, whether he must always

hold a hearing, and the like" (Opinion, p. 34). He addressed himself exclusively to the affidavit requirement which, he said, "does infringe Dr. Briehl's interest in maintaining privacy and upon interests protected by the First Amendment" (*id.* at p. 31). However, he justified that requirement on the ground that it "might prove relevant to a valid denial of a passport" (*ibid.*).

(3) Judge Bazelon's dissenting opinion, Chief Judge Edgerton concurring, concluded:

> "(1) the President has not delegated to the Secretary of State the power to decide which Americans may travel and which may not; (2) neither of the two statutes relied on by the Secretary as a source of such power—22 U. S. C. § 211a and 8 U. S. C. § 1185—grants the power, in terms, either to the President or to the Secretary; (3) a construction of either or both of the statutes as granting the power would conflict with other expressions of congressional policy and would raise constitutional doubts of the utmost gravity, especially to the extent that eligibility is made to depend upon matters of political beliefs and associations; (4) since the power was not conferred by statute, the President does not possess it, for it is not one of the powers inherent in his office" (Opinion, p. 69).

(4) The Chief Judge wrote a separate dissenting opinion, agreeing with Judge Bazelon that "the President and Congress have not undertaken to delegate to the Secretary the authority he claims" and that if he had done so "serious constitutional questions would arise". He declared that "the Secretary should be directed to issue a passport" (Opinion, pp. 70-71).

(5) Judge Fahy also dissented, in a separate opinion. Relying upon the earlier decision of the same court sitting

en banc, in *Boudin* v. *Dulles*, 98 U. S. App. D. C. 205, 235 F. 2d 532 (1956), he concluded that the Secretary should be required to reconsider the case and render a decision upon findings of fact. While Communist Party membership might be relevant to the right to travel, he stated, "It does not follow * * * that refusal by the applicant to furnish this relevant information, without more, brings denial of his application into conformity with due process" (Opinion, p. 74). He distinguished *Garner* v. *Los Angeles Board*, 341 U. S. 716 (1951), on the ground that the affidavit there "was required by law and was with respect to retaining State employment". "Furthermore, the failure of appellant to furnish the information may have been in good faith reliance upon the First Amendment, *cf. Konigsberg* v. *State Bar of California*, 353 U. S. 252, or for other good faith reasons * * *" (Opinion, pp. 74, 76).

Reasons for Granting the Writ

The Court below, in these cases, has decided important questions of federal law which have not been, but should be, settled by this Court; and it has, in some respects, decided those questions in a way which conflicts with applicable decisions of this Court.[3]

The questions decided here stem from the Secretary of State's imposition of political conditions on the issuance of passports to American citizens. Early authoritative adjudication of those questions by this Court is vital to the proper administration of the passport laws and to a definition of the citizen's constitutional rights in the field of

[3] Furthermore, as will appear, *infra*, p. 26, the opinion of four of the Circuit judges that "a passport denial may be based upon confidential information." (Opinion, p. 27) conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9, 1955).

foreign travel. The Secretary himself has recognized the urgency of a ruling by this Court.[4]

The questions presented are of recent vintage. Until the last decade, the Government imposed no general restrictions on the right to travel abroad by reason of a citizen's political views or associations. Soon after the close of World War II, however, the Secretary of State began sporadically to apply the formula, "contrary to the best interests of the United States," as a ground for revoking or denying passports. "*Passport Denied*": *State Department Practice and Due Process*, Note, 3 Stanford Law Review 312 (1951); *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review; Comment*, 61 Yale Law Journal 171 (1952).[5] Following criticism of his

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[4] In his news conference of May 14, 1957, Secretary of State Dulles said (The New York Times, May 15, 1957, p. 10):

"* * * Of course, the whole legal area as regards passports is somewhat in doubt, and there are pending a number of cases in the courts which, if they go up to the Supreme Court, will probably lead to some authoritative decision as to just what the functions and responsibilities of the Secretary of State are as regards passports. And whether or not it will be held that there is a right to travel everywhere which is superior to foreign policy, I don't know. If the courts so decide, naturally, I will accept such a decision. But as long as it is the practice, and so far as it is consonant with judicial opinions, to hold that the issuance of a passport involves foreign policy considerations—so long as that is the case, I will have to exercise my authority in accordance with what I judge to be the interests of the United States.

"Q. Would you like to see a court test made of that, sir? A. Yes. * * *"

[5] The Secretary initially denied passport facilities under this formula, *inter alia*, to such noted citizens as Dr. Linus Pauling, the world-renowned chemist; Judge William Clark, formerly of the Third Circuit Court of Appeals; Dr. Martin Kamen, now professor of biochemistry at Brandeis University; and Dr. Otto Nathan, professor of economics at New York University and executor of the

passport procedures by the statutory court in *Bauer* v. *Acheson*, 106 F. Supp. 445 (1952), the Secretary promulgated the regulations of August 28, 1952, here in issue, which, for the first time in American history, established political standards for travel abroad during peacetime.

These Passport Regulations, which have adversely affected the lives of thousands of American citizens, have led to widespread scholarly and editorial criticism.[6] In less than five years, they have inspired a score of lawsuits in the

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estate of Albert Einstein. Confronted with the threat of court orders directing quasi-judicial hearings, or adverse publicity, the Secretary later issued passports to those citizens. See Pauling, *My Efforts to Obtain a Passport*, 8 Bulletin of Atomic Scientists 253 (1952); Sen. Comm. on Judiciary, Subc. on Constit. Rts., Hrgs., Nov. 15-16, 1955, 84th Cong., 1st Sess., pp. 200 ff., 271-284, 364-368, 375, 377-378; *Clark* v. *Dulles*, 129 F. Supp. 950 (D. C. D. C., 1955); *Dulles* v. *Nathan*, 96 U. S. App. D. C. 190, 225 F. 2d 29 (1955).

[6] See, for example: Parker, *The Right to Go Abroad: To Have and to Hold a Passport*, 40 Virginia L. R. 853 (1954); Barnett, *Passport Administration and the Courts*, 32 Oregon L. R. 193 (1953); Wyzanski, *Freedom to Travel*, Atlantic Monthly, October, 1952; Doman, *A Comparative Analysis: Do Citizens Have the Right to Travel*, 43 A. B. A. J. 307 (1957); Editorials: Chicago Daily Sun Times, November 26, 1955; New York Times, May 4, 1956; Denver Post, May 27, 1956.

Perhaps the most eminent critic of these passport policies is the former Secretary of State who himself promulgated the regulations of 1952; he characterizes them as "a grave mistake and a failure to foresee consequences which were inevitable." Acheson, *A Democrat Looks at His Party* (1955), p. 127.

The increasing concern of distinguished commentators is exemplified by such writings as O'Brian, *National Security and Individual Freedom* (1955), pp. 39, 48; Chafee, *Three Human Rights in the Constitution* (1956), pp. 162-214; Gellhorn, *Individual Freedom and Governmental Restraints* (1956), p. 15; Cushman, *Civil Liberties in the United States* (1956), pp. 113-116.

District Court for the District of Columbia [7] and have led to six major decisions, other than those in the instant cases, in the court below: *Dulles* v. *Nathan*, 96 U. S. App. D. C. 190, 225 F. 2d 29 (1955); *Schachtman* v. *Dulles*, 96 U. S. App. D. C. 287, 225 F. 2d 938 (1955); *Boudin* v. *Dulles*, 98 U. S. App. D. C. 305, 235 F. 2d 532 (*en banc*, 1956); *Dayton* v. *Dulles*, 99 U. S. App. D. C. 47, 237 F. 2d 43 (1956); *Kraus* v. *Dulles*, 98 U. S. App. D. C. 343, 235 F. 2d 840 (1956); *Stewart* v. *Dulles*, C. A. D. C. Nos. 13533, 13622, 13638 (*en banc*, July 3, 1957).

The marked divergence of the views expressed in these several cases by the judges of the Court of Appeals sitting *en banc* emphasizes the pressing need for review by this Court, which has never had occasion to consider the important questions involved.[8] The magnitude of the problem is indicated further by the large numbers of citizens affected: More than a million Americans annually use passports for travel abroad;[9] and over half a million passports are issued each year [10] upon application forms which since 1956 require every applicant to state whether he is or ever

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[7] Among cases still pending in the District Court are *Duberg* v. *Dulles*, C. A. No. 2959-56; *Leff* v. *Dulles*, C. A. No. 2958-56; *Chodorov* v. *Dulles*, C. A. No. 1733-56; *Lamont* v. *Dulles*, C. A. No. 1463-57.

[8] Only once in its entire history has this Court had occasion to determine whether a litigant was entitled to a passport. *Perkins* v. *Elg*, 307 U. S. 325 (1939). That case involved the single issue, whether the petitioner was a citizen; it did not involve the validity of the regulations here, which were promulgated many years later, or the constitutional problems here presented.

This Court denied certiorari in *Robeson* v. *Dulles*, 98 U. S. App. D. C. 313, 235 F. 2d 810 (1956), cert. den. 352 U. S. 895 (1956), where the petitioner, unlike those herein, had not pursued the administrative remedy. See Washington, J., Opinion, p. 29.

[9] Statistical Abstract of the United States, 1956, pp. 100-101.

[10] Hearings before Subcommittee of Committee on Appropriations, U. S. Senate, 85th Congress 1st sess. H. R. 6871, p. 557.

was a member of the Communist Party—the most widespread loyalty test imposed in our history upon American citizens desiring to exercise a constitutional right.

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1. Initially there is presented the important question whether, in promulgating and enforcing the Passport Regulations, the Secretary of State has exceeded his statutory authority and has acted in conflict with the Congressional intent expressed in pertinent legislation. Only four of the judges below were of the opinion that the Secretary was acting completely within his authority; two of the judges thought his regulations were totally invalid; of the remaining judges, one believed that the regulations were in part invalid, and the other found it unnecessary to pass upon their validity.

Rule 19(b) of the Rules of this Court provides that conflicts between Courts of Appeals are a consideration in determining whether a writ shall be granted. Since all passport cases necessarily arise in the Court of Appeals for the District of Columbia Circuit, such a conflict can never be present in cases of this sort. Certainly, however, the sharp differences of opinion appearing among the eight Judges of the Circuit who heard the instant case, present a situation analogous to a conflict between Circuits.

In addition to the five opinions written in this case, three were written in *Stewart* v. *Dulles*, *supra*, which also presents issues arising out of the Passport Regulations. And, finally, the conflict in the District Court for the District of Columbia is so great that it may almost be said that each Judge has his own formula for handling problems arising under the Regulations. Cases *supra*, p. 13.

2. The Passport Regulations explicitly purport to be based upon a single statute, 22 U. S. C. 211a. That statute, enacted at a time when the right to travel was not depend-

ent upon a passport, only centralizes the function of passport issuance in the Secretary;[11] it does not authorize the establishment of a classification system of travellers and non-travellers. For nearly a century since the enactment of the statute in 1856 (11 Stat. 60) both the President and the Secretary apparently deemed their authority in passport issuance to be thus limited. During that period the Secretary never presumed to establish substantive conditions to the issuance of passports or to the exercise of the right to travel; and the President never claimed the right to establish such conditions directly or by delegation through the Secretary. Acting under the statute, both President and Secretary merely prescribed the nature of the proof of citizenship—the prime condition established by Congress for passport issuance—and the mechanics of administration (Opinion, pp. 38-39).

The majority below find authority in the Secretary to establish the substantive conditions he has opposed, not in the Act of 1856, but in the provisions of another statute, 8 U. S. C. 1185. The Passport Regulations, which expressly cite 22 U. S. C. 211a, omit any reference to 8 U. S. C. 1185. And with good reason. For, as Judge Bazelon points out, this latter statute merely granted the President, in a national emergency, discretion to determine for which parts of the world passports were required, "not to determine which Americans are to receive passports" (Opinion, p. 40).

Moreover, the Passport Regulations conflict with the Congressional intention expressed in pertinent legislation.

(a) In 1856, Congress established its first criterion for passport issuance, that of citizenship; and, until 1950, that remained the sole condition to issuance of a passport.[12]

[11] Dept. of State, The American Passport (1898), *passim*.

[12] Except insofar as it was expanded in 1902, to include "other proof * * * owing allegiance, whether citizens or not * * *." A variant to this occurred during the Civil War, when non-citizens who had borne arms for the Union were entitled to passports. 32 Stat. 386.

In 1950, Congress enacted section 6 of the Internal Security Act, 50 U. S. C. 785, denying passports to present members of organizations required by a final order of the Subversive Activities Control Board to register as Communist organizations. In contradistinction, the Passport Regulations deny passports to "persons who support the world Communist movement". Such support is determined by an assessment of the citizen's entire life. While the standards of the regulations are amorphous and based upon *past* activities, the restriction in the Internal Security Act is precise and refers to persons who *remain* members of an organization which is the subject of a final order of the Board.

This inconsistency between regulation and statute is admitted *sub silentio* by the Secretary's claim that the Passport Regulations enforce "the spirit of the law".[13] But the Department is subject to the specific terms of the laws and standards established by Congress, including the procedures and timetable for putting them into operation. Its anticipation of them and enlargement upon them, however motivated, is inconsistent with the legislative will and hence invalid. *United States* v. *Symonds*, 120 U. S. 46, 49-50 (1887); see also *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129 (1936); *Miller* v. *United States*, 294 U. S. 435 (1935); *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599 (1930); *Merritt* v. *Welsh*, 104 U. S. 694 (1882).

(b) Secondly, as Judge Bazelon concludes (Opinion, pp. 42-43), the Regulations, in permitting the Secretary to say who among our citizens may leave and who may not leave,

[13] See testimony of Mr. Scott McLeod, Administrator of the Bureau of Security and Consular Affairs, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, p. 192.

negate the "right of expatriation" declared as a policy by Congress in 1868 and never repealed. 15 Stat. 223-224, R. S. 1999, 8 U. S. C. 800 (1940 ed.); see *Savorgnan* v. *United States*, 338 U. S. 491, 498, n. 11 (1950). For expatriation today is impossible without leaving the country. 8 U. S. C. 1481, 1483.

3. The broad construction of 22 U. S. C. 211a and 8 U. S. C. 1185 which the court below sanctions raises serious constitutional problems. This consideration, in itself, would support the narrower construction of the statutes which the dissenting judges have adopted. *United States* v. *Rumely*, 345 U. S. 41, 46 (1953); *United States* v. *Witkovitch*, 353 U. S. 194 (1957).

No statute supplies any standards for the Secretary's classifications of citizens who may travel abroad and of those who may not; it is doubtful if Congress could delegate such powers of classification, essentially a law-making power, to the Executive Branch. *Wayman* v. *Southard*, 10 Wheat. (23 U. S.) 1, 43 (1825). Certainly it could not do so without providing standards, *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 398 (1940); *United States* v. *Rock Royal Cooperative*, 307 U. S. 533, 576 (1939). And such standards, totally lacking here, would have to be precise since they deal with "an attribute of personal liberty". *Williams* v. *Fears*, 179 U. S. 270, 274 (1900). *Saia* v. *New York*, 334 U. S. 558, 560 (1948); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Hague* v. *C. I. O.*, 307 U. S. 496 (1939); *Niemotko* v. *Maryland*, 340 U. S. 268, 271 (1951); *Burstyn* v. *Wilson*, 343 U. S. 495 (1952).

The absence of Congressional delegation is not cured by resort to the so-called inherent powers of the President in foreign affairs and national security (see Judge Prettyman's opinion, pp. 9, 10, 22). Neither of those extraordinary Presidential powers warrants the limitations which

are imposed on the citizen's right to travel. The limited nature of such powers and of the history of their exercise is set forth in Judge Bazelon's dissent (Opinion, pp. 54-68). Attempted extension of such powers to sanction Executive transgression of private rights in matters of internal affairs has only recently been struck down by this Court, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 632, 644 (1952).

4. The Secretary of State has denied passports to petitioners because they failed to meet his political standards (B.R. 65-68, K.R. 76-84). The judgments of the Court below sustain the Secretary's denial on that ground. Thus, this case presents for decision those "far-reaching and complex questions relating to freedom of speech, press and assembly" which this Court found it unnecessary to reach in *Konigsberg* v. *State Bar of California*, *supra*.

All of the judges of the Court of Appeals agree that these regulations abridge First Amendment rights (Opinion, pp. 22, 31, 44, 70, 74). Such abridgments are *prima facie* invalid and "ordinarily irrelevant to permissible subjects of governmental action". *American Communications Association* v. *Douds*, 339 U. S. 382, 391 (1950); *Bridges* v. *Wixon*, 326 U. S. 135 (1945). Four of the judges, however, deem such abridgments clearly warranted by considerations of national security. But neither they, nor the Secretary, have sustained the burden of justifying those abridgments either under the "clear and present danger test" (*Thomas* v. *Collins*, 323 U. S. 516, 530); under the *Dennis* test: "that the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger" *United States* v. *Dennis*, 183 F. 2d 201, 212 (1950); adopted in *Dennis* v. *United States*, 341 U. S. 494, 510 (1951); or under any other test.

Judge Prettyman's argument that "the Communist movement today is an international conspiracy" (Opinion, p. 6) fails to indicate how the travel of Americans will so aid that evil that First Amendment rights must be overruled. He makes two suggestions, (1) that such travel will permit "communication" between "adherents to the Communist movement" (Opinion, p. 21) and, (2) that, if abroad, they might arouse hostile activities by the Soviet Union which would require the United States to protect them (*id.*, pp. 21-22).

Since adequate means of communication exist without travel, however, the real question is whether it is reasonable to place this large net over the hundreds of thousands of Americans who have joined organizations on our multifarious "subversive" lists (see Morison, *Freedom in Contemporary Society* (1956), pp. 35-42). Moreover, if the Government may bar communication for reasons of national security, it would be equally proper to prohibit the use of the mails, cables and telephone to such persons (see Judge Bazelon's dissent, Opinion, p. 48). Each such restriction upon communication raises the same problems of reconciliation with the First Amendment.

The fear of international involvement consequent on travel of Communist sympathizers is speculative to the point of unreality. Further, our Government is not required to protect American citizens who behave improperly and, historically, it has refused to do so. See, *e. g.*, Borchard, *Diplomatic Protection of American Citizens Abroad*, (1915), p. 356; *U. S. ex rel. Keefe v. Dulles*, 94 U. S. App. D. C. 381, 384-85, 222 F. 2d 390, 393-94 (1954), cert. den. 348 U. S. 952 (1955).

The Passport Regulations are not based upon the two considerations advanced by Judge Prettyman, but upon

those which have induced political repression in all areas during the last decade: the desire to create political conformity and to punish political dissenters. The distinguished character of the citizens denied passports and the activities ascribed to them by the Secretary, amply support this conclusion (*supra*, notes 4, 6). This Court has recently expressed its concern over the effects of this policy of repression. *Sweezy* v. *New Hampshire*, 354 U. S. 234, 248, 262-264 (1957); *Watkins* v. *United States*, 354 U. S. 178, 197. See also Learned Hand, *The Spirit of Liberty* (1952), p. 257; O'Brian, *supra*, note 6, *passim*.

The common denominator of the classes proscribed by § 51.135 of the regulations is lawful activity, political in character, disapproved of by the Secretary. The regulations in practice are invariably predicated upon § 51.135 (b)—activities deemed to support the Communist movement. None of the litigated cases, including the present ones, involves a charge of present or recent membership under § 51.135(a). Indeed, the Secretary is indifferent to a denial of recent activity. *Stewart* v. *Dulles*, *supra*. In none does the Secretary claim that the sworn statement of the purpose of travel is untrue or that travel for that purpose is proscribed by the Regulations.

Hence, the Secretary has sought to prevent an American lawyer from representing clients abroad before quasi-judicial tribunals, *Boudin* v. *Dulles*, *supra*; the executor of an estate from settling its affairs, *Dulles* v. *Nathan*, *supra*; a scientist from attending professional conventions, *Kamen* v. *Dulles*, *infra*, No. 617; and a playwright from writing movie scripts on location in Spain, *Stewart* v. *Dulles*, *supra*. In each of the score of litigated cases, the Secretary has decided that the applicant's past political associations may make him unfit for travel.

The disqualifications in the present cases are on the basis of such constitutionally protected activities as petitioning the government, seeking repeal of the Walter-McCarran Act, asserting one's constitutional privilege before a Congressional committee, holding or expressing views on public issues and connections with organizations on the Attorney General's list or that of the House Un-American Activities Committee (B.R. 13-14, 22-23; and K.R. 24-26).

Insofar as the Passport Regulations posit ineligibility for travel on past conduct antedating their promulgation, they also constitute a bill of attainder and retroactive penal legislation, in violation of Article I, section 9 of the Constitution. See *Ex parte Garland*, 71 U. S. 333 (1867); *Cummings* v. *Missouri*, 71 U. S. 277 (1867). Likewise objectionable as a bill of attainder is § 51.142 of the regulations, which provides that "If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings."

5. The requirement that the passport applicant proceed to disprove, by sworn statement, the allegations made by the Secretary of State and execute an affidavit as to past and present membership in the Communist Party raises additional constitutional problems.

It is an ingenious device to avoid the determination of constitutional issues and to require a litigant to surrender some constitutional rights as a precondition to the determination of others. It would shift the burden of proof imposed by the courts below in *Dulles* v. *Nathan*, *supra*, from the Secretary to the applicant and dispense with the quasi-judicial hearing to which passport applicants are entitled under the passport decisions of the court below, see cases, *supra*, p. 13, and the decisions of this and other

courts, *Ex parte Garland, supra; Cummings* v. *Missouri, supra; Goodyear Synthetic Rubber Corp.* v. *Department of Industrial Relations,* — Ohio —, 122 N. E. 2d 503 (1954); *Philadelphia Co.* v. *Securities and Exchange Commission,* 84 App. D. C. 73, 175 F. 2d 808 (1948).

The courts have repeatedly struck down attempts to compel disclosure of political assertions as a precondition to the assertion of rights. *Rudder* v. *United States,* 96 App. D. C. 329, 226 F. 2d 51 (1955); *Kutcher* v. *Housing Authority of Newark,* 20 N. J. 181, 119 A. 2d 1 (1955); *Lawson* v. *Housing Authority of Milwaukee,* 270 Wis. 269, 70 N. W. 2d 605 (1955), cert. den. 350 U. S. 882 (1955); *Housing Authority of the City of Los Angeles* v. *Cordova,* 130 Cal. App. 2d Supp. 883 (1955), cert. den. 350 U. S. 969 (1956); *Chicago Housing Authority* v. *Clark,* 4 Ill. 2d 319, 122 N. E. 2d 522 (1954).

The authority to compel such disclosure has never been implied, *United States* v. *Minker,* 350 U. S. 179 (1956); *United States* v. *Witkovich, supra*; has always required explicit statutory support, see *Garner* v. *Board of Public Works,* 341 U. S. 716 (1951); *Gerende* v. *Board of Supervisors,* 341 U. S. 56 (1951); *American Communications Association* v. *Douds, supra,* and has invariably been limited to government employment or discretionary use of governmental facilities. *Ibid.*

In equating the demand for proof of political probity with an application for a license, the majority below overlooked the fact that travel is a constitutional right, not subject to licensing in the ordinary sense. See *Lovell* v. *Griffin, supra,* at 451; Judge Bazelon's dissent (Opinion, p. 45). Further, unlike an application for a license, those who, like Drs. Linus Pauling and Otto Nathan, have executed such oaths for the Passport Office have found them disre-

garded.[14] Conversely, the Secretary "may waive these Regulations on an *ad hoc* basis, if he desires to do so."[15]

6. The court below has repeatedly held that the right to travel abroad is protected by the due process clause of the Fifth Amendment. *Dulles* v. *Nathan, supra; Schachtman* v. *Dulles, supra; Boudin* v. *Dulles, supra; Dayton* v. *Dulles, supra; Kraus* v. *Dulles, supra.* While these decisions are consistent with this Court's rulings upholding the right of American citizens to travel within the United States, *Edwards* v. *California*, 314 U. S. 160, 180-181 (1941); *Crandall* v. *Nevada*, 73 U. S. 35, 44 (1867); *United States* v. *Wheeler*, 254 U. S. 281, 293 (1920); *Williams* v. *Fears, supra*, the issue as to foreign travel has never been presented to this Court.

The Passport Regulations, as written and applied to petitioners, pose important issues as to substantive due process in their indifference to the purpose of the travel, their reliance upon associations with organizations on the "subversive lists" of the Attorney General and the House Committee on Un-American Activities, the absence of *scienter*, and their vagueness.

(a) Petitioners' travel for professional reasons, in one case to attend a convention on mental health and in the other to paint pictures, is obstructed on the ground of their past political associations. Assuming, *arguendo*, the existence of power in the Secretary to restrain the movements of citizens through passport control or otherwise, such restraints are arbitrary and unreasonable unless related to the purpose of the travel, rather than to the

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[14] Sen. Comm. on Judiciary, Subc. on Constit. Rights, 84th Cong., 2d sess. (1955), pp. 103-140.

[15] *Id.*, p. 198.

political heterodoxy, of the citizen. The absurdity of the standards is epitomized by the statement that "the Department is not willing to grant you [Mr. Kent] passport facilities for travel to any countries for any purpose" (K.R. 10). This absence of rational basis for discrimination among citizens causes a violation of due process under *Nebbia* v. *New York*, 291 U. S. 502 (1934), and *Konigsberg* v. *State Bar of California*, *supra*.

(b) The reliance upon the citizen applicant's connection with organizations on the "subversive lists" conflicts with this Court's conclusions with respect to such lists expressed in *Barsky* v. *Board of Regents*, 347 U. S. 442 (1954) and *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (1951); and with the views of the appellate courts in *Schachtman* v. *Dulles*, *supra*; and *United States* v. *Remington*, 191 F. 2d 246 (2d Cir. 1951), *cert. den.*, 343 U. S. 907 (1952).

(c) The Secretary's indifference to the individual's state of mind, indeed to his personal activities, is amply demonstrated by his failure to challenge the contents of, indeed even to read, the article written by Dr. Briehl (B.R. 39-40, B.R. 52-58). Such indifference to *scienter* violates this Court's strictures in *Wieman* v. *Updegraff*, 344 U. S. 183 (1952); *Schware* v. *Board of Examiners*, 353 U. S. 232, 246 (1957), and *Konigsberg* v. *State Bar of California*, *supra*.

(d) The vagueness of the regulations is manifest from a mere reading of them. They refer to "adherence to the Communist Party line" and to "the Communist movement" and to persons acting "in furtherance of the interests and under the discipline of the Communist Party" (§ 51.135). Such vagueness is compounded by the use of such terms as "under such circumstances as to warrant the conclusion" or "on the balance of all the evidence",

since no evidence is revealed to the applicant and he must testify completely in the dark and "confirm his oral statements in an affidavit for the record" (§ 51.137).

These standards violate "the first essential of due process of law". *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926); *Small* v. *American Sugar Refining Co.*, 267 U. S. 233, 238-240 (1925); see *United States* v. *Hautau*, 43 F. Supp. 507 (D. N. J., 1942). This Court will be particularly critical of vagueness where, as here, First Amendment rights are involved; *Burstyn* v. *Wilson*, *supra*; *Winters* v. *New York*, 333 U. S. 507 (1948); *Niemotko* v. *Maryland*, *supra*; *Kunz* v. *New York*, 340 U. S. 290 (1951). Even the more precise term, Communist Party membership, raises serious problems of definition and proof, *Jencks* v. *United States*, 353 U. S. 657, 678 (1957) (Burton, J., concurring). The far more imprecise language of the Passport Regulations and the possibility of criminal sanctions amply justifies review of these cases.

6. The Passport Regulations also raise substantial questions of procedural due process. Two years ago, the court below declared that, notwithstanding the Secretary's regulations, passport applicants were entitled to a quasi-judicial hearing. *Dulles* v. *Nathan*, *supra*. It has since repeated this injunction on five separate occasions. Cases *supra*, p. 13. Notwithstanding, the Secretary has continued his regulations unchanged except for periodic reports of "studies" being made by the Department.

The "hearings" afforded under the regulations are still based upon unsworn broad "allegations" which the Secretary recites without adopting. His agents produce no evidence against the applicant but choose instead to examine him under oath as to his political associations and

opinions. The decision of the Passport Office is based upon secret reports which, in turn, are based upon secret informants, of whose names and veracity the Department often has no knowledge,[16] and "after consultation with other interested officers" (§ 51.137) whose advice is not disclosed to the applicant. The proceedings before the Board of Passport Appeals of the Department are a repetition of those before the Passport Office (§§ 51.151-51.170); and the Board's report to the Secretary is never revealed to the applicant.

These procedures clearly do not comport with due process as enunciated in decisions of this Court. *Morgan* v. *United States*, 304 U. S. 1, 18 (1938); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 302-304 (1937); *Lloyd Sabaudo S.A.* v. *Elting*, 287 U. S. 329, 335-336 (1932); *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274, 288-289 (1924). These decisions, which involve property rights, must be liberally applied to cases involving the personal liberty of movement.

Moreover, the approval of four of the judges below of the Secretary's resort to confidential information disclosed neither to the applicant nor to the courts (Opinion, p. 27), is plainly in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester*, *supra*, which set aside as unconstitutional Coast Guard regulations concerning the issuance of validated merchant mariner's documents, which, for seamen, are tantamount to passports (22 C. F. R. § 53.2(c)).

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[16] See the stipulation in *Kamen* v. *Dulles*, D. D. C., C. A. No. 1121-55 dated June 6, 1955, which appears in Hearings, Sen. Comm. on Judiciary, Subc. on Constit. Rights, *supra*, pp. 92-93. And see paragraph 4 of the affidavit of John Foster Dulles, dated January 11, 1956, in *Boudin* v. *Dulles*, *supra*.

In view of this Court's disposition to review the fairness of hearings involving the "privilege of Government employment", *Bailey* v. *Richardson*, 341 U. S. 918 (1951); *Peters* v. *Hobby*, 349 U. S. 331 (1954), it will be even more concerned with procedural due process affecting the constitutional right to travel.

8. The Secretary's indifference to the lower court's repeated directions to afford quasi-judicial hearings and other elements of due process violated by the Passport Regulations is inconsistent and incompatible with the rule of law which should govern all branches of the Government. It puts a premium on litigation because only then will the citizen receive the protection to which he is entitled. Clearly the authoritative voice of this Court is necessary to insure due process for non-litigants.

CONCLUSION

For the first time in American history, American citizens are being denied the right to travel by reason of lawful political associations, beliefs and expressions. For the first time, a Secretary of State has imposed substantive conditions upon the right to travel, conditions inconsistent in letter and in spirit with those established by Congress.

These cases present unusual, complex and far-reaching problems of a statutory, constitutional and practical nature which have never been considered by this Court. We are immediately concerned with a physician and an artist who desire to travel abroad in the interests of their respective professions. But the Passport Regulations affect not only these two citizens and the 700,000 annual passport applicants, who must pass the first political test ever extended to citizens who desire no government bounty

or privilege, but all American citizens who are warned that their exercise of First Amendment rights may prevent them from ever going abroad for purposes of vacation, business, or education. Cf. the Chief Justice's remarks in *Watkins* v. *United States*, *supra*, at pages 197-8.

The justification advanced for this drastic interference with a right traditionally free from control by the government is a familiar one in these times. But, as Judge Bazelon said, "The word Communist is not an incantation subverting at a stroke our Constitution and all our cherished liberties" (Opinion, p. 46).

For a decade, this nation has been subjected to the undemocratic passport policies of the State Department. These policies, irrational when promulgated, are becoming more irrational every day as the need for international communication and cooperation increases. The policies, originally directed against alleged subversives, as with all such arrogations of power, were extended by the Secretary—first, to prevent travel by a distinguished critic of our foreign policy, *Clark* v. *Dulles*, *supra*, and then to prevent newspapermen from reporting what is happening abroad. As Chief Judge Edgerton cautioned below (Opinion, p. 70): "We have temporized too long with the passport practices of the State Department. Iron curtains have no place in a free world"

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

September 13, 1957.

Respectfully submitted,

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APPENDIX A

1. The pertinent sections of Title 22 of the United States Code are as follows:

§ 211a. *Authority to grant, issue, and verify passports.*—The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls, when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

§ 212. *Who entitled to passport.*—No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.

2. Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. 1185, as codified, is as follows in pertinent part:

§ 1185. Travel control of citizens and aliens during war or national emergency—Restrictions and prohibitions on aliens.

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

(1) [There follow restrictions enumerated (1) through (7) not here pertinent.]

* * *

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

3. Title I, § 6 of the Internal Security Act of 1950, 64 Stat. 993, 50 U. S. C. 785, as codified, is as follows:

(a) When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

(c) As used in this section, the term "member" shall not include any individual whose name has not been made public because of the prohibition contained in section 9 (b) of this title.

4. The Expatriation Act of 1868, 15 Stat. 223-224, R. S. § 1999 is as follows:

Right of expatriation

Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation is declared inconsistent with the fundamental principles of the Republic.

5. The pertinent portions of the Regulations of the Secretary of State, as found in Title 22 of the Code of Federal Regulations, are as follows:

(a) Part 51 of Title 22, 1955 Supplement:

§ 51.135. *Limitations on issuance of passports to persons supporting Communist movement.*—In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence

—that they continue to act in furtherance of the interests and under the discipline of the Community [sic] party;

(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;

(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement."

§ 51.136.[19] *Limitations on Issuance of passports to certain other persons.* In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a person when it appears to the satisfaction of the Secretary

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[19] The provisions of Section 51.136 are here set forth as amended by the Secretary of State, 21 F. R. 336, January 18, 1956. These amendments have not yet been reflected in the Supplement to the Code of Federal Regulations. Prior to that date § 51.136 read as follows:

"§ 51.136 *Limitations on Issuance of Passports to Persons Likely to Violate Laws of the United States.* In order to promote the national interest by assuring that the conduct of foreign relations shall be free from unlawful interference, no passport, except one limited for direct and immediate return to the United States, shall be issued to persons as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities while abroad which would violate the laws of the United States, or which if carried on in the United States would violate such laws designed to protect the security of the United States."

of State that the person's activities abroad would: (1) violate the laws of the United States; (2) be prejudicial to the orderly conduct of foreign relations; or (3) otherwise be prejudicial to the interests of the United States.

§ 51.137. *Notification to persons whose passport application is tentatively disapproved.*—A person whose passport application is tentatively disapproved under the provisions of § 51.135 or § 51.136 will be notified in writing of the tentative refusal, and of the reasons on which it is based, as specifically as in the judgment of the Department of State security considerations permit. He shall be entitled, upon request, and before such refusal becomes final, to present his case and all relevant information informally to the Passport Division. He shall be entitled to appear in person before a hearing officer of the Passport Division, and to be represented by counsel. He will, upon request, confirm his oral statements in an affidavit for the record. After the applicant has presented his case, the Passport Division will review the record, and after consultation with other interested offices, advise the applicant of the decision. If the decision is adverse, such advice will be in writing and shall state the reasons on which the decision is based as specifically as within the judgment of the Department of State security limitations permit. Such advice shall also inform the applicant of his right to appeal under § 51.138.

§ 51.138. *Appeal by passport applicant.*—In the event of a decisitor adverse to the applicant, he shall be entitled to appeal his case to the Board of Passport Appeals provided for in § 51.139.

§ 51.139. *Creation and functions of Board of Passport Appeals.*—There is hereby established within the Department of State a Board of Passport Appeals, hereinafter referred to as the Board, composed of not less than three officers of the Department to be designated by the Secretary of State. The Board shall act on all appeals under § 51.138.

The Board shall adopt and make public its own rules of procedure, to be approved by the Secretary, which shall provide that its duties in any case may be performed by a panel of not less than three members acting by majority determination. The rules shall accord applicant the right to a hearing and to be represented by counsel, and shall accord applicant and each witness the right to inspect the transcript of his own testimony.

§ 51.140. *Duty of Board to advise Secretary of State on action for disposition of appealed cases.*—It shall be the duty of the Board, on all the evidence, to advise the Secretary of the action it finds necessary and proper to the disposition of cases appealed to it, and to this end the Board may first call for clarification of the record, further investigation, or other action consistent with its duties.

§ 51.141. *Bases for findings of fact by Board.*—(a) In making or reviewing findings of fact, the Board, and all others with responsibility for so doing under §§ 51.135 to 51.143, shall be convinced by a preponderance of the evidence, as would a trial court in a civil case.

(b) Consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line will suffice, prima facie, to support a finding under § 51.135(b).

§ 51.142. *Oath or affirmation by applicant as to membership in Communist Party.*—At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.

§ 51.143.[20] *Applicability of Sections 51.137-51.142.* Except for action taken by reason of noncitizenship or geographical limitations of general applicability necessitated by foreign policy considerations, the provisions of §§ 51.137-51.142 shall apply in any case where the person affected takes issue with the action of the Secretary in granting, refusing, restricting, withdrawing, canceling, revoking, extending, renewing or in any other fashion or degree affecting the ability of such person to receive or use a passport.

RULES OF THE BOARD OF PASSPORT APPEALS

§ 51.151. *Organization of Board.*—The Secretary of State shall appoint a Board of Passport Appeals consisting of three or more members, one of whom shall be designated by the Secretary as Chairman. The Chairman shall assure that there is assigned to hear the appeal of any applicant a panel of not less than three members including himself or his designee as presiding officer, which number shall constitute a quorum.

§ 51.152. *Decisions of the Board.*—Decisions shall be by majority vote. Voting may be either in open or closed session on any question except recommendations under § 51.140, which shall be in closed

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[20] The provisions of Section 51.143 are here set forth as amended by the Secretary of State, 21 F. R. 336, January 18, 1956. These amendments have not yet been reflected in the Supplement to the Code of Federal Regulations. Prior to that date, § 51.143 read as follows:

"§ 51.143 *Applicability of Sections 51.135-51.142.* When the standards set out in § 51.135 or § 51.136 are made relevant by the facts of a particular case to the exercise of the discretion of the Secretary under § 51.75, the standards in §§ 51.135 and 51.136 shall be applied and the procedural safeguards of §§ 51.137-51.142 shall be followed in any case where the person affected takes issue with the action of the Department in granting, refusing, restricting, withdrawing, cancelling, revoking, extending, renewing, or in any other fashion or degree affecting the ability of a person to use a passport through action taken in a particular case."

session. Decisions under § 51.140 shall be in writing and shall be signed by all participating members of the Board.

§ 51.153. *Counsel to the Board.*—A Counsel, to be designated by the Secretary of State, shall be responsible to the Board for the scheduling and presentation of cases, aid in legal and procedural matters, information to the applicant as to his procedural rights before the Board, maintenance of records and such other duties as the Board or the Chairman, on its behalf, may determine.

§ 51.154. *Examiner.*—The Board may, within its discretion, appoint an examiner in any case, who may, with respect to such case, be vested with any or all authority vested in the Board or its presiding officer, subject to review and final decision by the Board, but, an applicant shall not be denied an opportunity for a hearing before the Board unless he expressly waives it.

§ 51.155. *Chairman.*—The Chairman, or his designee, shall preside at all hearings of the Board, and shall be empowered in all respects to regulate the course of the hearings and pass upon all issues relating thereto. The Chairman, or his designee, shall be empowered to administer oaths and affirmations.

§ 51.156. *Prior administrative remedies.*—It is required that prior to petitioning for an appeal, an applicant shall (a) exhaust the administrative remedies available in the Passport Office, as set out in § 51.137, and (b) comply with the provisions of § 51.142, as a part of his application, if deemed necessary by the Passport Office.

§ 51.157 *Petition.*—An applicant desiring to take an appeal shall, within thirty calendar days after receipt of the advice of adverse decision by the Passport Office file with the Board a written petition under oath or affirmation which shall, in plain and concise language, refute or explain the reasons stated by the Passport Office for its decision.

§ 51.158 *Delivery of papers.*—Petitions or other papers for the attention of the Board may be delivered personally, by registered mail, or by leaving a copy at the offices of the Board at the address to be stated in the advice of adverse action furnished applicant by the Passport Office.

§ 51.159 *Notice of hearing.*—Applicant shall receive not less than five calendar days notice in writing of the scheduled date and place of hearing which shall be set for a time as soon as possible after receipt by the Board of applicant's petition.

§ 51.160 *Appearance.*—Any party to any proceedings before the Board may appear in person, or by or with his attorney, who must possess the requisite qualifications, as hereinafter set forth, to practice before the Board.

§ 51.161 *Applicant's attorney.*—(a) Attorneys at law in good standing who are admitted to practice before the Federal courts or before the courts of any State or Territory of the United States may practice before the Board.

(b) No officer or employee of the Department of State whose official duties have, in fact, included participation in the investigation, preparation, presentation, decision or review of cases of the class within the competence of the Board of Passport Appeals shall, within two (2) years after the termination of such duties appear as attorney in behalf of an applicant in any case of such nature, nor shall any one appear as such attorney in a case of such class if in the course of prior government service he has dealt with any aspects of the applicant's activities relevant to a determination of that case.

§ 51.162 *Supplementary information to applicant.*—The purpose of the hearing is to permit applicant to present all information relevant and material to the decision in his case. Applicant may, at the time of filing his petition, address a request in writing to the Board for such additional information or explanation as may be necessary to the preparation of his case. In conformity with the relevant

laws and regulations, the Board shall pass promptly and finally upon all such requests and shall advise applicant of its decision. The Board shall take whatever action it deems necessary to insure the applicant of a full and fair consideration of his case.

§ 51.163 *Hearings.*—The Passport file and any other pertinent Government files shall be considered as part of the evidence in each case without testimony or other formality as to admissibility. Such files may not be examined by the applicant, except the applicant may examine his application or any paper which he has submitted in connection with his application or appeal. The applicant may appear and testify in his own behalf, be represented by counsel subject to the provisions of § 51.161, present witnesses and offer other evidence in his own behalf. The applicant and all witnesses may be cross-examined by any member of the Board or its counsel. If any witness whom the applicant wishes to call is unable to appear personally, the Board may, in its discretion, accept an affidavit by him or order evidence to be taken by deposition. Such depositions may be taken before any person designated by the Board and such designee is hereby authorized to administer oaths or affirmations for the purpose of the depositions. The Board shall conduct the hearing proceedings in such manner as to protect from disclosure information affecting the national security or tending to disclose or compromise investigative sources or methods.

§ 51.164 *Admissibility.*—The Board and the applicant may introduce such evidence as the Board deems proper. Formal rules of evidence shall not apply, but reasonable restrictions shall be imposed as to the relevancy, competency, and materiality of evidence presented to the Passport Office's stated reasons for its decision and/or to the application of § 51.135 or § 51.136 to applicant's case.

§ 51.165 *Argumentation.*—All argumentation shall be directed to the application of the passport regulations to the facts of the particular case. The Board will permit no oral argument or motions relative to

the legality or propriety of the hearing or other procedures of the Board. Submission of such argument or motions will be confined to the filing of written briefs, objections, or motions to be made a part of the record. The Board will not undertake to consider any such motion or contention.

§ 51.166 *Privacy of hearings.*—Hearings shall be private. There shall be present at the hearing only the members of the Board, Board's Counsel, official stenographers, Departmental employees concerned, the applicant, his counsel, and the witnesses. Witnesses shall be present at the hearing only while actually giving testimony.

§ 51.167 *Misbehavior before Board.*—If, in the course of a hearing before the Board, an applicant or attorney is guilty of misbehavior, he may be excluded from further participation in the hearing. In addition, he may be excluded from participation in any other case before the Board.

§ 51.168. *Transcript of hearings.*—A complete verbatim stenographic transcript shall be made of hearings by qualified reporters, and the transcript shall constitute a permanent part of the record. Upon request, the applicant and each witness shall have the right to inspect the transcript of his own testimony.

§ 51.169. *Notice of decision.*—The Board shall communicate the action recommended under § 51.140 on all cases appealed to it, to the Secretary of State. The decision of the Secretary of State shall be notified in writing to the applicant. Such notice shall be given the applicant as promptly as possible after his hearing before the Board.

§ 51.170. *Probative value of evidence.*—In determining whether there is a preponderance of evidence supporting the denial of a passport the Board shall consider the entire record, including the transcript of the hearing and such confidential information as it may have in its possession. The Board shall take into consideration the inability of the applicant to meet information of which he has not

been advised, specifically or in detail, or to attack the creditability of confidential informants.

(b) Part 53 of Title 22:

§ 53.1. *Limitations upon travel.*—No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into the continental United States, the Canal Zone, and all territories, continental or insular, subject to the jurisdiction of the United States, unless he bears a valid passport which has been issued by or under authority of the Secretary of State and which, in the case of a person entering or attempting to enter any such territory, has been verified by an American diplomatic or consular officer either in the foreign country from which he started his journey, or in the foreign country in which he was last present if such country is not the one from which he started his journey, or unless he comes within one of the exceptions prescribed in §§ 53.2 and 53.3 * * *.

§ 53.2. *Exceptions to regulations in § 53.1.*—No valid passport shall be required of a citizen of the United States or a person who owes allegiance to the United States:

* * *

(b) When traveling between the United States and any country or territory in North, Central or South America or in any island adjacent thereto: *Provided*, That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States via any country or territory in North, Central or South America or in any island adjacent thereto, for which a valid passport is required under §§ 53.1-53.9: * * *.

* * *

§ 53.5. *Prevention of departure from or entry into the United States.*—(a) Nothing in this part shall be construed as prohibiting the Secretary of State or his representative at a port in the United States from preventing the departure from or entry into the United States, including the Canal Zone and all territories, continental or insular, subject to the

jurisdiction of the United States, of a citizen of the United States or a person who owes allegiance to the United States unless he bears a passport, card of identification, or other document of identity issued by or under authority of the Secretary of State, notwithstanding the fact that he may be destined for or arriving from a place outside any such territory of the United States for which a valid passport is not required under the regulations in this part.

(b) Nor shall anything in the regulations in this part be construed as prohibiting the Secretary of State or his representative at a port in the United States from preventing temporarily the departure from or entry into the United States, including the Canal Zone and all territories, continental or insular, subject to the jurisdiction of the United States, of a citizen of the United States or a person who owes allegiance to the United States, notwithstanding the fact that such person may bear a valid passport, card of identification, or other document of identity issued by or under authority of the Secretary of State or be destined for or arriving from a place outside any such territory of the United States for which a valid passport is not required under the regulations in this part.

* * *

§ 53.8 *Discretional exercise of authority in passport matters.*—Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 13,317

April Term, 1957

C. A. 5042-55

WALTER BRIEHL,

Appellant,

v.

JOHN FOSTER DULLES, Secretary of State,

Appellee.

Filed June 27, 1957.

JOSEPH W. STEWART,
Clerk.

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher and Bastian, Circuit Judges, sitting en banc.

JUDGMENT

This cause came on to be reheard en banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment .... of the said District

Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: June 27, 1957.

PER CURIAM.

Circuit Judges Prettyman, Miller, Washington, Danaher and Bastian vote to affirm.

Chief Judge Edgerton and Circuit Judge Bazelon vote to reverse.

Circuit Judge Fahy votes to remand to the District Court with instructions to remand to the Secretary.

Circuit Judge Burger took no part in the consideration or decision of this case.

Circuit Judge Prettyman filed an opinion in which Circuit Judges Wilbur K. Miller, Danaher and Bastian concur.

Circuit Judge Washington filed an opinion concurring in the result.

Circuit Judge Bazelon filed a dissenting opinion in which Chief Judge Edgerton concurs.

Chief Judge Edgerton also filed a separate dissenting opinion.

Circuit Judge Fahy filed a dissenting opinion.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 13,297

April Term, 1957

C. A. 3441-55

ROCKWELL KENT,

Appellant,

v.

JOHN FOSTER DULLES, Secretary of State,

Appellee.

Filed June 27, 1957.

JOSEPH W. STEWART,
Clerk.

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher and Bastian, Circuit Judges, sitting en banc.

JUDGMENT

This cause came on to be reheard en banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment ... of the said District

Court appealed from in this cause be, and the sam
hereby, affirmed.

Dated: June 27, 1957.

Per Circuit Judge Prettyman

Circuit Judges Prettyman, Miller, Washington, Da
her and Bastian vote to affirm.

Chief Judge Edgerton and Circuit Judge Bazelon vo
to reverse.

Judge Fahy votes to reverse and to remand for furth
proceedings before the Secretary of State consistentl
with the views set forth in his opinion in No. 13,317, *Brie*
v. *Dulles*.

Circuit Judge Burger took no part in the consideratio
or decision of this case.

Office - Supreme Court, U.S.
FILED
SEP 18 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 481

ROCKWELL KENT and WALTER BRIEHL, *Petitioners*,

v.

JOHN FOSTER DULLES, *Secretary of State*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX TO PETITION FOR CERTIORARI

(Opinions of the Court Below)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13317

WALTER BRIEHL, APPELLANT

v.

JOHN FOSTER DULLES, Secretary of State, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 27, 1957

Mr. Leonard B. Boudin, with whom *Messrs. David Rein* and *Joseph Forer* were on the brief, for appellant.

Mr. B. Jenkins Middleton, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Mr. Oliver Gasch*, United States Attorney, and *Mr. Paul A. Sweeney*, Attorney, Department of Justice, were on the brief, for appellee. *Mr. Lewis Carroll*, Assistant United States Attorney, also entered an appearance for appellee.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER and BASTIAN, Circuit Judges, sitting *en banc*.

EDGERTON, *Chief Judge*, announced the judgment and division of the court as follows:

The judgment of the District Court, granting the Secretary's motion for summary judgment, is affirmed.

Judges Prettyman, Miller, Washington, Danaher and Bastian vote to affirm. Judges Edgerton and Bazelon vote to reverse. Judge Fahy votes to remand to the District Court with instructions to remand to the Secretary. Judge Burger took no part in the consideration or decision of this case.

Judge Prettyman files an opinion in which Judges Miller, Danaher and Bastian concur. Judge Washington files an opinion concurring in the result reached by Judges Prettyman, Miller, Danaher and Bastian. p. 29. Judge Bazelon files a dissenting opinion in which Judge Edgerton concurs. p. 34. Judge Edgerton also files a separate dissent. p. 70. Judge Fahy files a dissenting opinion. p. 71.

PRETTYMAN, *Circuit Judge*, with whom WILBUR K. MILLER, DANAHER and BASTIAN, *Circuit Judges*, concur: Appellant, Dr. Walter Briehl, applied in April, 1955, to the Department of State for renewal of a passport, stating his desire to attend an international psychoanalytic congress in Geneva and a World Mental Health Organization Congress in Istanbul. He was and is engaged in the practice of medicine, specializing in psychiatry. In prior years he had attended international meetings in this field. The Director of the Passport Office wrote him that "it would be helpful to the Department if you would furnish an affidavit setting forth whether you are now or ever have been a Communist, and explain your connections with" certain named organizations. Dr. Briehl's attorney replied, saying in part:

> "My clients refuse to submit the affidavits your letters request. Your demands and the vague and formless standards of the passport regulations under which you purport to act are palpable violations of their Constitutional rights, including, but not limited to, the First, Fifth, Ninth and Tenth Amendments."

The attorney described Dr. and Mrs. Briehl's professional interests and concluded by saying: "Demand is

hereby made that passports as applied for by them be issued forthwith."

Thereupon the Director of the Passport Office wrote Dr. Briehl, saying in part:

> "I regret to inform you that after careful consideration of your application for the renewal of passport facilities, the Department of State is obliged to disapprove your request tentatively on the ground that the granting of such further passport facilities is precluded under the provisions of Section 51.135 of Title 22 of the Code of Federal Regulations. A copy of the pertinent Regulations is enclosed for your information.
>
> "In cases coming within the purview of the Regulations above referred to, it is the practice of the Department to inform the applicant of the reasons for the disapproval of his request for passport facilities insofar as the security regulations will permit. In your case it has been alleged that you were a Communist."

Dr. Briehl's attorney replied in part:

> "[My clients] wish you to be advised that they do not choose to offer any evidence in support of their applications for passports unless and until they are confronted with the informers your letter states have furnished you with proof that they have been, are, or intend to engage in acts contrary to the national interests of this country."

Thereafter the attorney wrote several times demanding the issuance of the passports and "an evidentiary hearing". An "informal" hearing was arranged. Dr. Briehl, his attorney, and two representatives of the State Department attended. The attorney made an extended statement, in the course of which he recounted the correspondence, described Dr. Briehl's purposes in seeking to go abroad, and made three points as follows:

> "Our first point, therefore, is that medicine has nothing to do with politics and you may not introduce and confuse the issue of his right to practice medicine and his right to study, and his right to

participate in conferences by injecting this issue of politics in connection with his travel abroad. When a physician has a legitimate purpose in going abroad as was stated here, all issues of political affiliations, past or present, definite or indefinite, good or bad, are irrelevant. That will be our first point. * * *
My second point is that everyone has the right to travel regardless of political considerations. * * *
Now we turn to the third point. * * * that you confront us with the evidence against Dr. Briehl. * * * It is up to the Department to support those allegations by evidence and witnesses which we can examine and confront. * * * [W]e have a right to what the courts have now called a quasijudicial hearing, * * * and * * * it is the Department's job to prove not only the facts with respect to each of these allegations but it is the Department's job to prove wherein each of these activities was wrong and wherein the activities were in violation of the laws of the United States."

The attorney later said:

"* * * Dr. Briehl will not execute an affidavit of the kind you requested. He will not execute an affidavit with respect to past membership; he will not execute an affidavit with respect to present membership; he will not execute an affidavit with respect to future membership. And that does not apply only to the Communist Party situation, it applies to any political activities or associations or beliefs because those are things which we think are irrelevant to the right of travel and particularly irrelevant, in fact, incredibly so, to the right of a physician to travel for the purposes indicated in the application for the passport renewal."

In response to a letter from Dr. Briehl's attorney, counsel for the Board of Passport Appeals replied:

"It is understood that you appeared with your client, Dr. Briehl, at a hearing in the Passport Office on August 30, 1955. It is further understood that Dr. Briehl refused to execute an affidavit as to present or past membership in the Communist Party, having been requested to do so by the Passport Office.

The Board has not been advised of any further processing of this case under Section 51.137 of the Passport Regulations.

"In these circumstances, the Board could not entertain an appeal from Dr. Briehl at this time. Your attention is invited to Sections 51.138 and 51.142 (22 CFR) of the Passport Regulations, and Sections 51.156(2) and 51.147 (22 CFR) of the Rules of the Board."

And a few days later the Passport Office wrote:

"You will recall that during the recent informal hearing in which you represented Dr. Briehl, he refused to explain or deny the allegations concerning him. He also refused to submit an affidavit setting forth whether he was or ever had been a member of the Communist Party.

"In view of the above, the Department knows of no further action which it can appropriately take in the case of Dr. Briehl."

Dr. Briehl filed a civil action in the District Court, naming the Secretary of State as defendant. He prayed for a judgment decreeing that he is entitled to a passport under the statutes, that the passport regulations of the Secretary of State are invalid and illegal, and that the refusal to renew the passport was in violation of his (Briehl's) rights under the Passport Act of 1926, the Constitution of the United States and the Declaration of Human Rights of the United Nations; enjoining the Secretary from continuing to deny the passport; and directing him to renew the passport.

The Secretary answered, and a motion and a cross motion for summary judgment were made, with supporting affidavits and exhibits. The court rendered a brief opinion, denied the plaintiff's motion, and granted the motion of the Secretary.

In this court Dr. Briehl divides his argument into four main points:

1. Appellant's constitutional right to travel could not be conditioned upon his execution of a non-

Communist affidavit or compliance with any other political test.

2. Appellee's regulations deprive appellant of procedural due process and the quasi-judicial hearing to which he is entitled under the recent decisions of this Court.

3. The regulations are not authorized by statute, they conflict with the will of Congress and were invalidly promulgated.

4. The Secretary has not made out a case against appellant, even under the Regulations.

The arguments thus advanced involve consideration of six basic subjects.

I

The nature of the Communist movement. Dr. Briehl's underlying premise, as shown by the statements we have quoted, is that Communist membership or affiliation is a matter of politics, an issue of political affiliation, a political consideration, a political test, and thus is subject to the same rules which apply to political beliefs generally. But it is not so. The Communist organization and program have long since passed beyond the area of mere politics and political opinion. All three branches of the Federal Government—the executive, the legislature, and the judiciary—have declared unequivocally that the Communist movement today is an international conspiracy aimed at world domination and a threat to the internal security of this country. The foreign policy and a large part of the fiscal policy of the Government are based upon that proposition.

The Congress declared in 1950:

"There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the

world through the medium of a world-wide Communist organization."[1]

President Truman declared in 1950:[2]

"WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

"WHEREAS, if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to choose those who conduct their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; * * *".

In his Inaugural Address of January, 1957, President Eisenhower said:

"The divisive force is international communism and the power that it controls.

"The designs of that power, dark in purpose, are clear in practice. It strives to seal forever the fate of those it has enslaved. It strives to break the ties that unite the free. And it strives to capture—to exploit for its own greater power—all forces of change in the world, especially the needs of the hungry and the hopes of the oppressed."[3]

In his State of the Union speech on January 10, 1957, the President had said: "The existence of a strongly armed imperialistic dictatorship poses a continuing threat to the free world's and thus to our own Nation's secu-

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[1] 64 STAT. 987, 50 U.S.C.A. §781(1).

[2] Proc. No. 2914, 64 STAT. A454, 50 U.S.C.A. App. 6 (1951).

[3] 103 CONG. REC. 729 (daily ed. Jan. 21, 1957).

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rity and peace."[4] He referred to "Communist persecution" and to "Soviet aggression".[5]

The Supreme Court has held valid and sufficient the findings of Congress[6] and the findings of a jury[7] to the same import as the foregoing declarations. In *Galvan v. Press* the Court quoted the above-quoted congressional finding and said: "Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress."[8] In *American Communications Ass'n v. Douds*[9] the Court, balancing the interest of the public against a partial abridgement of speech, upheld the statutory requirement that a person must swear he is not a member of the Communist Party before he can avail himself or his organization of the processes of the Labor Board.[10]

There exists in some quarters a dogged insistence that the Communist movement be treated as any other political organization. It is as though one argued that, since opiates and aspirin both possess medicinal properties, they must be subjected to the same permissions and restrictions. The fact is that opiates are to be and are regulated because of their own peculiar characteristics. And so is the Communist movement and its affiliates. It

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[4] 103 CONG. REC. 389 (daily ed. Jan. 10, 1957).

[5] *Id.* at 390.

[6] Galvan v. Press, 347 U.S. 522, 98 L.Ed. 911, 74 S.Ct. 737 (1954).

[7] Dennis v. United States, 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857 (1951).

[8] *Supra* note 6, 347 U.S. at 529.

[9] 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674 (1950).

[10] And see the opinion of Mr. Justice Jackson in American Communications Ass'n v. Douds, *id.*, 339 U.S. at 424 *et seq.*, with its accumulation of underlying data.

would be inexcusably naive for any court to declare in the present state of the world that adherence to the Communist cause is a mere matter of politics or political opinion. We shall treat the Communist movement according to what the Congress, the President, and the Supreme Court have declared it to be.

II

The power of government in foreign affairs. Whatever may be the dispute—and it has been extended and intense—as to the division of this power as between the President and the Congress, it seems settled beyond dispute that those two branches between them possess the totality of the power. In a long line of cases, beginning perhaps with *Foster* v. *Neilson*[11] and extending down to *United States* v. *Curtiss-Wright Corp.*,[12] *United States* v. *Belmont*,[13] *Chicago & Southern Air Lines* v. *Waterman Corp*,[14] and *Ludecke* v. *Watkins*,[15] the Supreme Court has laid down the rule that foreign affairs and decisions upon foreign policy are political matters entrusted by the Constitution to the political departments of the Government, and that the judiciary has no part in them. Mr. Justice Jackson, writing for the Court in the *Chicago & Southern Air Lines* case, stated the proposition in succinct, quotable terms. He wrote:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has avail

[11] 27 U.S. (2 Pet.) 253, 7 L.Ed. 415 (1829).

[12] 299 U.S. 304, 81 L.Ed. 255, 57 S.Ct. 216 (1936).

[13] 301 U.S. 324, 81 L.Ed. 1134, 57 S.Ct. 758 (1937). *Belmont* is discussed at length and with approval in United States v. Pink, 315 U.S. 203, 86 L.Ed. 796, 62 S.Ct. 552 (1942).

[14] 333 U.S. 103, 92 L.Ed. 568, 68 S.Ct. 431 (1948).

[15] 335 U.S. 160, 92 L.Ed. 1881, 68 S.Ct. 1429 (1948).

able intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." [16]

The range of permissible judicial action in the case at bar is narrowed also by the fact that the Secretary is acting in the context of a national emergency. Only the President may declare an emergency; he has done so.[17] The existence of an emergency indisputably enhances both executive and legislative power.[18] The Secretary has acted pursuant to two acts of Congress,[19] which not only recognize the administrative function of the executive in this area but also delegate to the execu-

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[16] *Supra*, 333 U.S. at 111. Extensive discussions of the doctrines underlying the powers of the President are in the opinions in Youngstown Co. v. Sawyer, 343 U.S. 579, 96 L.Ed. 1153, 72 S.Ct. 863 (1952).

[17] Proc. No. 2914, *supra* note 2.

[18] Hirabayashi v. United States, 320 U.S. 81, 87 L.Ed. 1774, 63 S.Ct. 1375 (1943).

[19] 44 STAT. 887 (1926), 22 U.S.C.A. § 211a; 66 STAT. 190 (1952), 8 U.S.C.A. § 1185.

tive any rule-making power it may have lacked. Thus the Secretary's acts are buttressed by the sovereign power to defend the nation.

There are of course in any government formed upon a constitution residual areas within which the judicial branch may act in respect to a power even so unfettered as is the executive power in foreign affairs. If the President were in gross defiance of constitutional limitations, or perhaps even of congressional prohibitions, the judiciary might act. The Supreme Court has also held[20] that, where the Secretary refused to issue a passport solely upon an erroneous finding of mixed law and fact (in that case citizenship), a decree precluding his denial on that ground could issue.

It must be kept in mind that the power of the judiciary to inquire is vastly different from its power to act. A court often has jurisdiction to determine whether it has jurisdiction. The books are full of cases in which the courts have examined with meticulous care complaints alleging invalidity of executive action in foreign affairs. But seldom if ever have the courts found grounds to impose upon such executive action their own ideas of propriety or wisdom. So in the case at bar it is not suggested that the court could not entertain a complaint against the Secretary of State alleging the illegality of his action. The point is that having examined the allegations the court is without power to act save in a narrow and limited class of extraordinary circumstances.

The inquiry in the case before us is whether the Secretary has so far violated constitutional prescriptions or specific congressional limitations as to cast his action outside the exceedingly broad boundaries within which he is free to act without judicial review.[21]

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[20] Perkins v. Elg, 307 U.S. 325, 349, 83 L.Ed. 1320, 59 S.Ct. 884 (1939).

[21] See Carrington, *Political Questions: The Judicial Check on the Executive*, 42 VA. L. REV. 175 (1956).

III

The nature of a passport. In *Urtetiqui* v. *D'Arbel*[22] the Supreme Court said in 1835:

> "It is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact."[23]

But, whatever may have been its nature in the past, the pertinent characteristic of a passport in the present controversy is that it is a requisite for going abroad. And thus it has become a tool with which the Department of State can prevent the presence of any American citizen in a foreign country.

A statute,[24] alluded to by the Supreme Court in *Johnson* v. *Eisentrager*,[25] provides that, whenever the President learns that a citizen of the United States has been deprived of his liberty by any foreign government, he must demand the reasons and, if it appears the imprisonment is wrongful, demand release and use such means not amounting to war as are necessary to effectuate the release. So, while a passport as such does not bestow rights of protection which a citizen does not otherwise have, it does, as a permit to travel abroad, allow him to put himself in a position where he may invoke the protective power of this government. So one of the questions here is whether the

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[22] 34 U.S. (9 Pet.) 692, 699, 9 L.Ed. 276.

[23] See 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW § 259 (1942).

[24] 15 STAT. 224 (1868), 8 U.S.C. § 903b [now 22 U.S.C.A. § 1732 (Supp. 1956)].

[25] 339 U.S. 763, 770, 94 L.Ed. 1255, 70 S.Ct. 936 (1950).

Secretary may prevent an American with Communist affiliations from being in a place where political indiscretion might involve the United States Government in international complications.

IV

The right to travel. The present dispute over passport denials is less than a decade old, but its antecedents are to be found deep in the history of Anglo-American law. The English sovereign had for many centuries a recognized right to prevent foreign travel and to recall subjects from abroad.[26] Late in the Eleventh Century Anselm, Archbishop of Canterbury, was forbidden by William Rufus, son of William the Conqueror, to go to Rome to receive the pallium from Pope Urban II.[27] The Magna Carta, as signed by John Lackland at Runnymede in 1215, deprived the King of the right to prevent foreign travel. However John died shortly afterward, and William Marshall, regent of Henry III, republished the Charter without the guarantees of freedom of travel.[28] In the following centuries the kings frequently exercised their prerogative, usually through the issuance of a writ *Ne Exeat Regnum.*[29] Parliament also exercised the prerogative by passing statutes which forbade foreign travel to certain classes[30] or which recognized the right of the

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[26] 1 BL. COMM. * 265; 3 CO. INST. * 178; 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 230 (5th ed. 1938); TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL LAW 128-130 (4th ed. 1890).

[27] 2 ENCYCLOPAEDIA BRITANNICA, *Anselm* (1945); BEAMES, NE EXEAT REGNO 1-2 (2d ed. 1824).

[28] See Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 GEO. L.J. 63 (1952) for a detailed account of the history of the Magna Carta and the status of the common law in this regard.

[29] 3 CO. INST. * 179.

[30] *Id.* at * 178-179.

King to limit travel.[31] However the writ has gradually fallen into disuse. It is most unlikely that a writ *Ne Exeat Regnum* would issue in modern England, except in time of war.[32] This does not mean that an Englishman has an enforceable right to a passport.[33]

The Articles of Confederation[34] and the Constitution of the United States[35] clearly recognized the right of citizens to travel among the various states. But whether the liberty mentioned in the Fifth Amendment included liberty to leave this country and circulate among foreign nations was not so clear. A three-judge federal District Court recognized in 1952 that a citizen has at least a limited right to international travel.[36] This court has since recognized that right.[37] However the existence of this limited right does not preclude the existence in the sovereign of a right to limit travel. The Supreme Court has established the power of the Government to recall a person from abroad to appear in a lawsuit, an exercise of the same sort of control over movement available to the English sovereign through *Ne Exeat Regnum*. In *Blackmer* v. *United States*[38] the Court made the broad

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[31] 5 RICHARD II, c. 2, §§ 6, 7 (1381), 2 STAT. AT L. 236 (Pick. 1762).

[32] See Note, 41 GEO. L.J., *supra* note 28, at 70; Diplock, *Passports and Protection in International Law*, 32 GROTIUS SOC. 42, 44 (1947).

[33] Diplock, *supra* note 32, at 53.

[34] Art. IV.

[35] Art. IV, § 2. See Hess v. Pawloski, 274 U.S. 352, 71 L.Ed. 1091, 47 S.Ct. 632 (1927); Williams v. Fears, 179 U.S. 270, 45 L.Ed. 186, 21 S.Ct. 128 (1900).

[36] Bauer v. Acheson, 106 F.Supp. 445 (D.C.D.C.).

[37] Shachtman v. Dulles, 96 U.S. App. D.C. 287, 225 F.2d 938 (1955).

[38] 284 U.S. 421, 437-438, 76 L.Ed. 375, 52 S.Ct. 252 (1932).

statement:

"What in England was the prerogative of the sovereign in this respect, pertains under our constitutional system to the national authority which may be exercised by the Congress by virtue of the legislative power to prescribe the duties of the citizens of the United States."

While *Blackmer* refers to the power to limit foreign travel as being exercised by the Congress, the power is not solely congressional. In matters pertaining to war and emergency or to the foreign policy, the power may reside in the executive or in both branches jointly. Whatever the theoretical residence of such power, the power to limit travel has in fact been exercised through the cooperative efforts of Congress and the President. During the War of 1812 Congress forbade citizens to travel into enemy countries without passports.[39] During the Civil War passports were required of all persons entering or leaving the country.[40] In 1861 Secretary of State Seward ordered that "Until further notice, no person will be allowed to go abroad from a port of the United States without a passport either from this Department or countersigned by the Secretary of State". This action was taken by the executive branch on its own initiative, without the sanction of Congress.

In 1856 Congress had granted the Secretary of State sole authority to issue passports.[41] The Secretary was authorized to issue them "under such rules as the President shall designate and prescribe". In 1918 Congress, leaving intact the broad discretion inherent in the words just quoted, gave the President power to make it unlawful to leave the country in time of war without

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[39] 3 STAT. 199 (1815).

[40] DEP'T OF STATE, THE AMERICAN PASSPORT—HISTORY AND DIGEST 50 (G.P.O. 1898).

[41] 11 STAT. 60.

passport.[42] The President exercised this power by an appropriate proclamation.[43] The period between the two World Wars saw Congress reaffirm in the executive the broad discretion declared in the 1856 act, the new language being "may grant".[44] This was in a 1926 act which remains today the underpinning of congressionally granted executive power in the field. That period also witnessed the codification in 1938 of State Department passport regulations and their affirmation by executive order.[45]

The machinery which today enables the State Department to regulate travel through passport control began to take shape in June of 1941, when Congress[46] amended the act of 1918[47] to enable the President to make it a crime to leave the country without a passport, not only in time of war but also during the existence of the national emergency proclaimed by the President on May 27, 1941.[48] On November 14, 1941, President Roosevelt exercised the authority over entry and exit vested in him by the amendment.[49] President Truman declared the termination of that state of emergency on April 28, 1952.[50] But the termination of the World War II emergency did not affect the Korean emergency declared by President

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[42] 40 STAT. 559, 22 U.S.C.A. §§ 223-226b (1952).

[43] 40 STAT. 1829 (1918).

[44] 44 STAT. 887 (1926), 22 U.S.C.A. § 211a.

[45] Exec. Order No. 7856, 3 FED. REG. 681, 22 C.F.R. §§ 51.1-51.77 (1949).

[46] 55 STAT. 252, 22 U.S.C.A. § 223 (1952).

[47] *Supra* note 42.

[48] Proc. No. 2487, 55 STAT. 1647.

[49] Proc. No. 2523, 55 STAT. 1696.

[50] Proc. No. 2974, 66 STAT. C31, 50 U.S.C.A. App. 3. (Supp. 1956).

Truman on December 16, 1950.[51] Consequently our nation has been in a continuing state of emergency since May of 1941.

By act of June 27, 1952,[52] Congress declared:

> "SEC. 215. (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, * * *
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> "(b) * * * and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

This statute applies to any national emergency. It would appear that the Korean emergency, existing when the statute became law, made the section above quoted immediately operative. Any doubt on this score was removed by President Truman's proclamation of January 17, 1953,[53] specifically invoking the 1952 act.

Two conclusions emerge from this complex series of laws, proclamations and orders. First, it is forbidden to leave this country without a passport. This rule was specifically provided by the Congress in the 1952 act, by the President in Proclamation No. 3004,[54] and by the

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[51] Proc. No. 2914, *supra* note 2.

[52] 66 STAT. 190, 8 U.S.C.A. § 1185.

[53] Proc. No. 3004, 67 STAT. C31.

[54] *Ibid.*

Secretary in Section 53.1 of his Regulations.[55] Second, it is within the power of the Secretary of State to refuse to issue a passport. This power is lodged in him by the act of 1926,[56] as implemented in Section 124 of Executive Order No. 7856;[57] is both claimed by the Secretary in Sections 53.1-53.9 of the Regulations and exercised by him thereunder; and is reaffirmed by the President in Proclamation No. 3004. The restrictions of the 1952 act upon travel without a passport can be read intelligibly only in the light of the Secretary's long-recognized power to refuse a passport.

Shortly after the passage of the 1952 act the Secretary issued additional regulations to govern the issuance of passports.[58] This was done pursuant to Executive Order No. 7856, *supra*, which specifically provided that the Secretary may make rules additional to the rules contained therein, so long as they are not inconsistent therewith.

V

The regulations of the Department. The regulations which the Secretary promulgated[59] provide in substance that, in order that persons who support the world Communist movement may not through the use of United States passports further the purposes of that movement, no passport shall be issued to persons who are members of the Communist Party or to certain others who are believed to engage in activities which will advance that movement; that a person whose application is tentatively denied under the foregoing will be notified in writing,

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[55] 22 C.F.R. § 53.1 (1949).

[56] *Supra* note 44.

[57] *Supra* note 45.

[58] 17 FED. REG. 8013 (1952), 22 C.F.R. §§ 51.135-51.143 (Supp. 1952).

[59] *Ibid.*

including notice of the reasons as specifically as security considerations permit; that such person will be entitled to present his case informally to the Passport Division and to appear before a hearing officer with counsel; and that if the decision is adverse it shall be in writing with reasons and the applicant shall be entitled to appeal to the Board of Passport Appeals, where he will be accorded a hearing with counsel. The regulations provide:[60]

> *"Oath or affirmation by applicant as to membership in Communist Party.* At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings."

The substantive part of the regulations[61] provides

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[60] 22 C.F.R. §51.142 (Supp. 1955).

[61] *Id.* § 51.135, reading in full text as follows:

"*Limitations on issuance of passports to persons supporting Communist movement.* In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

"(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion —not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party;

"(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement un-

that no passport shall be issued to certain described classes of persons. Roughly paraphrased those classes are (1) members of the Communist Party, (2) persons who have recently terminated Party membership under certain circumstances, (3) persons who support the Communist movement under certain circumstances, and (4) persons as to whom there is reason to believe they are going abroad for the purpose knowingly of advancing the Communist movement. We do not know from the record presently before us whether the Secretary would finally refuse a passport to Dr. Briehl if the matter were to progress to final decision, and we do not know in what proscribed class the Secretary might find Dr. Briehl upon the evidence before him if that evidence caused a refusal of the passport. And so we intimate no opinion upon the merits of Dr. Briehl's application; we have no opinion upon that subject. But, since we must determine the validity of the procedural provisions of the regulations, we face the validity of the underlying substantive provisions. We think those regulations[82] are valid as regulations.

The regulations in no way attempt to implement an unlimited discretion in the Secretary. They provide for peremptory denial of a passport under only one circumstance, admitted present membership in the Communist

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der such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement.

"(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement."

[82] *Ibid.*

Party (Sec. 51.142). Standards for denials upon other grounds are set up. That section of the regulations (51.135) obviously contemplates findings upon facts. It uses such terms as "under such circumstances as to warrant the conclusion", "not otherwise rebutted by the evidence", and "on the balance of all the evidence". Thus the regulations clearly require facts—revealed or unrevealed—and an evaluation of information. They do not provide for an unfettered discretion. Such provisions are the normal content of statutes or regulations which establish criteria for administrative action. Moreover, as we read the regulations, they refer to knowing associations with Communism.[63]

As we have pointed out, the Communist movement is, in the view of this Government, an aggressive conspiracy potentially dangerous to this country. Travel abroad by members of or adherents to the Communist movement is obviously an easy method of communication between such persons or organizations in this country and the prime sources of Communist policy and program in the Soviet Union and its satellites. Once a person with a passport is out of this country, this Government has no control over where he goes. His travel is controlled entirely by whatever countries he thereafter wishes to leave and to enter. The Department of State has authority to refuse to facilitate that communication.

In the second place, unless all the major foreign and fiscal policies of this Government, under two administrations of opposing political parties, have been a gigantic fraud, it is the unequivocal duty of the Department of State to prevent international incidents which might arouse hostile activities on the part of the Soviet Union or its satellites. To that end the Secretary may refuse to permit an adherent of the Communist movement,

[63] Wieman v. Updegraff, 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215 (1952).

clothed with American citizenship, from being present in places where he may readily create incidents or may assert statutory rights to activity on the part of this Government in his behalf. The Secretary may preclude potential matches from the international tinderbox.

As is recognized throughout this opinion, consistently with the other opinions of this court in this field,[64] the restrictions imposed by these regulations and the underlying statutes upon the right to travel are impingements upon that phase of liberty and indirectly upon the exercise of First Amendment rights. And so the problem in the case is once more the familiar problem of balancing private right against public requirement.[65] Our conclusion is reached by such a balancing. In the international situation of the present, the reasonable requirements of national security and interest and the delicate characteristics of foreign relations outweigh the needs or desires of an individual to travel, when the Secretary finds the facts to be such as to preclude grant of a passport under the regulation.

We therefore conclude that persons properly found to come within Section 51.135 of the Regulations are not illegally denied any constitutional right if they are refused passports.

It is suggested to us that, since the Internal Security Act of 1950[66] made certain provisions pertaining to passports to members of registered Communist organizations, it preempted the field and rendered null all other statutes and regulations relating to Communists and passports.

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[64] *E.g.*, Schachtman v. Dulles, *supra* note 37; Boudin v. Dulles, *infra*; Robeson v. Dulles, 98 U.S. App. D.C. 313, 235 F.2d 810 (1956), *cert. denied*, 352 U.S. 895, 1 L.Ed.2d 86, 77 S.Ct. 131 (1956); Dulles v. Nathan, 96 U.S. App. D.C. 190, 225 F.2d 29 (1955).

[65] See American Communications Ass'n v. Douds, *supra*.

[66] Sec. 6, 64 STAT. 993, 50 U.S.C.A. § 785.

Such a conclusion would have to be an inference; we find no specific provision to that effect. We think the inference is not supportable. The 1950 act made it unlawful for a member of a registered Communist organization to apply for a passport or to use one, and made it unlawful for any officer or employee of the United States to issue a passport to such a member. It prescribed penalties up to $10,000 fine and five years' imprisonment for violation.[67] So the 1950 act relating to passports is a criminal statute. It applies to only a portion of the people to whom the Secretary's regulations apply, as is easily seen by reference to Section 51.135. Moreover the 1952 statute, making it a crime for any person to leave the country without a passport during an emergency, was passed after the 1950 act. The 1952 act continued in effect the system of travel control by passport denial employed since 1941. That fact compels the conclusion that the criminal sanctions of the 1950 act are in addition to, not to the exclusion of, that control. Passport regulations under the later act are not prohibited by the former. We think the 1950 act did not preempt the field in respect to passports and adherents to the Communist movement.

VI

The requirement for an affidavit. In the case at bar Dr. Briehl was advised in writing that it had been alleged he was a Communist. He was required to admit or deny that allegation under oath before the proceeding on his application went further. Dr. Briehl urges, as we have seen, that he is entitled to be confronted with witnesses and evidence sustaining the Secretary's suggestions of Communist affiliations. He says he is entitled to that revelation without first filing an affidavit in response to the suggestions. He says this is a requisite of due

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[67] Sec. 15, 64 STAT. 1002, 50 U.S.C.A. § 794.

process. But our judicial process knows no such requirement. Our judicial process is that a party must plead before he is entitled to trial. There is nothing new or novel about that. Dr. Briehl says he is entitled to know his opponent's evidence before he pleads. Under the rules of civil procedure, if a defendant party does not plead, a default judgment is entered against him. We know of no reason why Dr. Briehl should not be required to admit or deny the Secretary's allegations before he gets an evidentiary hearing.

It is said that if Dr. Briehl should admit being a member of the Communist Party his application would thereupon promptly be denied, and therefore, it is said, no administrative remedy is really afforded him. But precisely the same thing happens to any party to a lawsuit. If he admits his opponent's allegations of fact he gets no evidentiary hearing; he gets an oral argument and perhaps a summary judgment against him. We know of no rule or doctrine that, if a party to a controversy admits adversary allegations of fact, the proceeding is void if no evidentiary hearing is thereafter afforded him. It is elementary that a party must raise an issue of fact in order to get a hearing on the facts.

In *National Council of American-Soviet Friendship v. Brownell*,[68] we held, citing several cases, that a party to an administrative proceeding could not default and still continue to litigate.

Moreover Dr. Briehl is an applicant. There is nothing new or novel about requiring an applicant for a permit or a license to supply pertinent information under oath. Applicants for radio licenses and air route certificates must do so, and applicants for marriage licenses, voting privileges, and business permits must also. And, failing to supply the required data, the applicant cannot exercise his right. We know of no reason why an appli-

[68] —— U.S. App. D.C. ——, 243 F. 2d 222 (1957).

cation for a passport should not be treated by the usual rules pertaining to applications. If Communist Party affiliations are pertinent to the Secretary's decision upon the possible consequences or complications of an applicant's presence in foreign countries or his roving about foreign areas in present world conditions, we see no reason why Communist affiliations should not be part of the data required by the application.

Dr. Brehl complains that the evidence in respect to the allegations asserted in the Secretary's advices to him may be in part confidential, and he argues that such possibility effectively nullifies the due process of the procedure. He seeks to bring the situation within the doctrine followed by the Ninth Circuit in *Parker* v. *Lester*,[69] that, if it be established in advance that a proffered administrative remedy will not afford due process, the remedy need not be pursued. It is true that a passport denial may be based upon confidential information. But due process of law is a term of variable content.[70] The necessity for secrecy in the conduct of foreign affairs has been asserted, seemingly without question, ever since President Washington refused to submit to the House of Representatives the documents relating to the Jay Treaty.[71] The Supreme Court said in the *Curtiss-Wright* case:[72]

> "The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive depart-

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[69] 227 F.2d 708 (1955).

[70] Moyer v. Peabody, 212 U.S. 78, 84, 53 L.Ed. 410, 29 S.Ct. 235 (1909); Communications Comm'n v. WJR, 337 U.S. 265, 275, 93 L.Ed. 1353, 69 S.Ct. 1097 (1949).

[71] See United States v. Curtiss-Wright Corp., *supra*, 299 U.S. at 320.

[72] *Id.* at 321.

ments. In the case of every department except the Department of State, the resolution *directs* the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is *requested* to furnish the information 'if not incompatible with the public interest.' A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned."

And recognition of the necessity for secrecy in foreign affairs, coupled with a strong admonition to the judiciary against any attempts on its part to peer into or to unveil such confidential material, is contained in the Court's opinion in the *Chicago & Southern Air Lines* case, from which we have quoted. That case concerned the right of an American company to do business abroad. That was a right of the applicant if he could meet the appropriate specifications. But the Supreme Court specifically and emphatically pointed out that the President could deny the application for secret and confidential reasons. We know of no reason why an individual's right to travel abroad is to be treated by different constitutional standards than is his right to do business abroad. And we know of no reason why treatment of alleged Communist affiliation is to be put upon a preferred basis as compared with ordinary commercial infirmities or adverse suggestions.

Further justification for secrecy in a case of this type is supplied by the fact that the nation is in a state of national emergency, caused by the infiltration program of the Communist movement. During such an emergency cabinet officers may be forced to act on the basis of information the publication of which is inconsistent with national security. When the Secretary of State avows that in the interest of national security he cannot spread certain information on an open record, and explains with as much particularity as possible the reasons why he cannot do so, courts must rely upon his integrity and accept his statement.

We held in *Boudin v. Dulles*[73] that, where a passport has been denied by the Secretary on the authority of a specific regulation, he (the Secretary) must make findings in writing responsive to the requirements of that regulation, and in such a case must state whether the findings are based on evidence openly produced or on secret information and, if the latter, "should explain with such particularity as in his judgment the circumstances permit the nature of the reasons why such information may not be disclosed." We adhere to that ruling. We are of the view that due process in passport proceedings does not prevent the use of confidential information when foreign affairs or the national security is involved.

In summary on this point we are of opinion that, if a person falls within one of the classes described in the regulations, the Secretary may refuse him a passport; and it follows that, if it be alleged he is in one of those classes and he refuses to admit or deny the allegation, the passport may be refused.

From the foregoing basic considerations some conclusions are easily reached. We summarize. In the deliberate judgment of this Government the Communist movement is today a conspiracy for world domination sufficiently threatening to the security of this nation to justify the expenditure of billions of dollars every year to thwart its ambitions. Limitations and prohibitions upon leaving one's country and traveling abroad have been enforced in periods of stress since time immemorial. It would be idle, if not ridiculous, in view of the absorption of the whole world in the problem of the Communist program and of the extent of the attention and activity of our own Government in that respect, for any court to say the present is not a period of stress in international affairs.

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[73] 98 U.S. App. D.C. 305, 235 F.2d 532 (1956).

The present limitations upon travel effectuated by passport control are authorized by statute and by presidential proclamation. They are, as we said in *Shachtman v. Dulles*,[74] an impingement upon a natural right of a citizen to travel. But no right, even the right to life, is absolute, and so the inquiry must be whether the impingement is valid. Executive action in the field of foreign affairs has been clothed in secrecy since the foundation of the Republic, and the Supreme Court has invariably protected that secrecy and repeatedly warned the judiciary not to invade that realm of executive prerogative. The rule has been applied by the Court even where the matter involved was transportation over international routes. Requirements that one admit or deny an adversary's allegations of fact before the right to an evidentiary hearing arises are elementary in judicial process; *a fortiori* in quasi-judicial process. And requirements that an applicant for a permit submit prescribed pertinent data as a prerequisite to consideration of his application are usual and valid in administrative procedure.

Analyzed to its underlying elements the critical problem in the case before us is simply whether the Secretary of State may decline to issue a passport to a person who refuses to admit or deny that he is a member of the Communist Party. We think he may. Or to state the problem in different terms, it is whether membership in or adherence to the Communist Party is a valid subject of inquiry prerequisite to the issuance of a passport under world conditions. We think it is.

We are of opinion that the disputed regulations of the Secretary are valid and that Dr. Briehl did not qualify himself for a passport under them. The judgment of the District Court, granting the Secretary's motion for summary judgment is

Affirmed.

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[74] *Supra* note 37.

WASHINGTON, *Circuit Judge*, concurring in the result:

The record discloses a "tentative" refusal by the Passport Office to renew Dr. Briehl's passport, and an official determination by that Office not to render a final decision on the matter because of Dr. Briehl's refusal at his hearing to furnish an affidavit, as provided for in Section 51.142 of the Passport Regulations, "with respect to present or past membership in the Communist Party." Unlike the applicant in *Robeson* v. *Dulles*, 98 U.S.App.D.C. 313, 235 F.2d 810, cert. denied, 352 U.S. 895 (1956), the appellant in this case has pursued the administrative and judicial steps open to him to raise the question whether the Secretary of State may validly require such an affidavit as a condition precedent to the rendering of a final decision. That question must now be decided.

The Secretary seeks to uphold his power to elicit information as to Communist Party membership as a procedure incident to the substantive power to restrict foreign travel through passport denial. Affidavit requirements of this sort are ordinarily valid if the information elicited is relevant to the exercise of a valid power. *Cf. Garner* v. *Board of Public Works*, 341 U.S. 716 (1951).[1] Implicit in the decisions of this court is the holding that the Secretary possesses a substantial measure of authority to restrict travel by passport denial.[2]

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[1] When the Supreme Court in *Garner* determined that the state agency may properly elicit from city employees information "that may prove relevant to their fitness and suitability for the public service," 341 U.S. at 720, it apparently assumed the proposition that the state agency had power to bar from employment those who are *not* fit or suitable for the public service.

[2] See Shachtman v. Dulles, 96 U.S.App.D.C. 287, 225 F.2d 938 (1955); Boudin v. Dulles, 98 U.S.App.D.C. 305, 235 F.2d 532 (1956); Dayton v. Dulles, 99 U.S.App.D.C. 47, 237 F.2d 43 (1956); *cf.* Kraus v. Dulles, 98 U.S.App.D.C. 343, 235 F.2d 840 (1956). The highly restrictive position

While the precise extent of that authority is still in process of being defined, Congress has not been silent or inactive. In the 1941 travel control statute, 8 U.S.C. § 1185, Congress provided, in substance, that when the President has proclaimed a national emergency and when he has found that the interests of the United States require additional restrictions on the departure of persons from the United States, it shall be unlawful for a citizen to leave the country without a valid passport. As Judge Prettyman points out, this statute has become operative. I read it as having been intended to authorize the Secretary to control, by passport denial, the travel of those whose journeying abroad is reasonably found to be contrary to the interests of the United States.

In the Internal Security Act of 1950, Congress made the following legislative finding, whose validity today can hardly be subject to challenge:

> "Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement." 50 U.S.C. § 781(8) (1952).

Congress implemented that finding by Section 6 of the Internal Security Act, 50 U.S.C. § 785 (1952), a provision which the framers of the Act no doubt thought would come into effect at a much earlier date than in fact has proved possible. But the congressional finding remains as an admonition to the executive branch to use

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taken by Judge Bazelon in his learned dissent is opposed to the spirit if not the letter of these decisions. But it may be agreed that further congressional action in the passport field would be very desirable.

its authority in all lawful ways to control the "travel of Communist members, representatives, and agents" so as not to facilitate communication or otherwise "further the purposes of the Communist movement." Therefore, I have no doubt that the Secretary has the power—in some cases at least—to deny passports on grounds to which past or present membership in the Communist Party "may prove relevant." *Garner, supra* at 720.

It must be admitted, I think, that the affidavit requirement does infringe Dr. Briehl's interest in maintaining privacy and upon interests protected by the First Amendment.[3] But if the interests of the public are also involved, the problem is "to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." *American Communications Ass'n* v. *Douds, supra*, at 399. The information as to Communist Party membership is asked for in connection with a passport application and might prove relevant to a valid denial of a passport. Under all the circumstances, it seems clear that the benefit to the public order, in having information of this sort available to the Secretary to enable him to exercise his lawful authority, substantially outbalances any abridgement of individual interests that may result. As Mr. Justice Murphy observed, concurring in *Board of Education* v. *Barnette*, 319 U.S. 624, 645 (1943): "The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, *except insofar as essential operations of government require it for the preservation of an orderly society*, —as in the case of compulsion to give evidence in court." (Emphasis supplied.) In the exercise of his powers over

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[3] See American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950); see also United States v. Rumely, 345 U.S. 41, 56 (1953).

the granting or withholding of passports, the Secretary is similarly entitled to relevant information.

For these reasons, I find no infirmity in the statutory and regulatory system which authorizes the Secretary to withhold a passport from any person who, by refusing to furnish the required affidavit, fails to complete his application.[4] Appellant has not suggested any reason or rule of law that would require a governmental agency to proceed to hear and determine on its merits the claim of a person seeking to exercise a right or privilege, when the claimant declines to file a complete application, as required by statute or by a regulation having—like the present one—the force of law.[5] Surely if a person desiring to vote declines to answer a question which may prove relevant to a valid ground of denial—such as his age, or where and when he last voted—an election board may thereupon refuse to permit him to vote until the question is answered, and need not make a considered determination that in fact he is ineligible. And even if the decision to deny a right could be said to require an exercise of discretion, I do not see why the decision-

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[4] 22 U.S.C. § 213 (1952) requires every passport applicant to furnish under oath an application containing "a true recital of each and every matter of fact which may be required by law or by any rules authorized by law." See also 22 C.F.R. 51.14. Section 51.142 of the regulations authorizes the affidavit, and Section 51.74 specifies that the affidavit "shall be considered as, and become, a part of the application."

[5] The thrust of appellant's argument is that the issuance of a passport is being unlawfully conditioned upon the requirement of a "test oath." But as the Supreme Court pointed out in *Garner, supra*, entirely different issues are raised by a requirement that certain conduct or affiliation be denied under oath, and by a requirement that information "with respect to" a stated subject matter be given.

maker must act in spite of the fact that he has not received answers to relevant questions which were properly asked, and which may provide information necessary for a proper decision.

It is important to bear in mind the distinction, which the Supreme Court pointed out in *Konigsberg* v. *The State Bar of California*, 353 U.S. 252 (1957), between the two courses of governmental action that can follow a refusal to answer a particular question propounded by a government agency. In *Konigsberg*, an adverse inference was drawn from a refusal to answer, and governmental action—denial of bar membership—was based in part on this inference. The Court held the inference to be unreasonable, since the refusal appeared to be based on a good faith reliance on a constitutional privilege, and therefore would not necessarily give rise to the adverse inference which the State had drawn. On the other hand, in the case at bar, no adverse inference was drawn from a refusal to answer. Here the government agency asserted its right to have certain information which was relevant to the exercise of valid authority, and declared in advance that it would not proceed until the information was forthcoming. This is precisely the sort of situation which the Court in *Konigsberg* contrasted with the inference-drawing approach that had been used there. As to this situation, the Court indicated that a serious First Amendment question would be raised, as has been recognized in this opinion, and that there would be a question of fairness if the applicant were not warned of the consequence of failure to answer. Here the regulations plainly indicate the result of a refusal to answer.

At this stage we are concerned only with a request for identification of affiliation *vel non*, unaccompanied by any direct penalty stemming from such identification. "No doubt issues like those now before us cannot be completely

severed from the political and emotional context out of which they emerge. For that very reason adjudication touching such matters should not go one whit beyond the immediate issues requiring decision." *American Communications Ass'n* v. *Douds*, *supra*, at 416 (Frankfurter, J., concurring in part). The question whether past or present membership in the Communist Party is in itself sufficient to support denial of a passport is not before us: there has not here been a denial based on such membership.[6]

It is also unnecessary and inappropriate for us to decide such questions as whether the Secretary's regulations are in every particular valid, whether he is justified in using confidential information, whether he must always hold a hearing, and the like. We need not in the present case attempt fully to define the scope of the Secretary's power, or that of the courts. We should do no more than decide the question actually before us.

BAZELON, *Circuit Judge*, with whom EDGERTON, *Chief Judge*, concurs, dissenting: The Secretary of State says his regulations, pursuant to which he denies passports to persons who "support the Communist movement," are a valid exercise of discretion delegated to him by the President. I think they are invalid because (1) the President did not undertake to delegate the discretion

[6] See Garner, *supra* at 720: "The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party . . . . *Not before us is the question whether* the city may determine that an employee's *disclosure* of such political affiliation *justifies his discharge*." (Emphasis supplied.)

the Secretary claims and (2) the President himself did not have this discretion.

For many years the Secretary of State has claimed an unlimited discretion to deny passports.[1] During the greater part of our history, when a passport was merely a comfort to the traveller, but not a necessity,[2] his claim went unchallenged. Since 1941, however, a passport has been a travel necessity,[3] and when the Secretary began denying or revoking passports on such grounds as "activities contrary to the best interests of the United States," or Communist membership or support, applicants turned to the courts for relief.[4]

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[1] See 3 Hackworth, DIGEST OF INTERNATIONAL LAW § 268 (1942).

[2] *Shachtman* v. *Dulles*, 96 U.S.App.D.C. 287, 289-90, 225 F.2d 938, 940-41 (1955).

[3] Actually the first requirement of a passport for travel was during World War I. Act of May 22, 1918, 40 STAT. 559, Proclamation No. 1473, Aug. 8, 1918, 40 STAT. 1829. These controls expired March 3, 1921. PUB.RES.NO. 64, 41 STAT. 1359. By Act of June 21, 1941, 55 STAT. 252, Congress amended the 1918 Act to apply during a proclaimed emergency and, on November 14, 1941, the President issued Proclamation No. 2523, 55 STAT. 1696, restoring travel controls which have remained in effect since then. The 1941 statute was replaced by § 215 of the Immigration and Nationality Act of 1952, 66 STAT. 190, 8 U.S.C. § 1185, and on January 17, 1953, the revised statutory authority was invoked by Proclamation No. 3004, 67 STAT. c. 631.

In addition to being legally required as an exit permit, a passport has become a practical necessity because foreign countries have increasingly been requiring it as a condition to entry. See *Shachtman* v. *Dulles*, 96 U.S.App.D.C. at 290, 225 F.2d at 941; *Bauer* v. *Acheson*, 106 F. Supp. 445, 451 (D.D.C. 1952); Comment, 61 YALE L.J., *infra* note 28, at 171-72.

[4] See, for example, *Bauer* v. *Acheson*, *supra* note 3; *Dulles* v. *Nathan*, 96 U.S.App.D.C. 190, 225 F.2d 29 (1955);

Bauer v. *Acheson*, 106 F.Supp. 445 (D.D.C. 1952), was the first reported case. There the Secretary based his authority on the President's inherent foreign relations power, and on the provision of 22 U.S.C. § 211a that the Secretary "*may* grant . . . passports . . . under such rules as the President shall designate and prescribe . . . ." The court held there was no authority to refuse or revoke a passport without notice and hearing. Less than two months later and presumably as a result of that decision, the Secretary promulgated the regulations now before us, declaring Communist supporters ineligible for passports and establishing a notice and hearing procedure.[5] *Until then, the only substantive passport qualification ever imposed by any statute*[6] *or regulation was citizenship.*[7]

Shachtman v. *Dulles*, *supra* note 2; *Boudin* v. *Dulles*, 98 U.S. App.D.C. 305, 235 F.2d 532 (1956); *Robeson* v. *Dulles*, 98 U.S.App.D.C. 313, 235 F.2d 810 (1956), *cert. denied*, 352 U.S. 895 (1956); *Dayton* v. *Dulles*, 99 U.S.App.D.C. 47, 237 F.2d 43 (1956).

[5] 17 FED.REG. 8013, Sept. 4, 1952, 22 C.F.R. §§ 51.135-51.143 (1957 Supp.).

[6] Section 6 of the Internal Security Act of 1950, 64 STAT. 993, 50 U.S.C. § 785, which makes it a crime for a "member of a [Communist] organization" to apply for or use a passport, is inoperative until such an organization has registered or been finally ordered to do so. Neither of these events has occurred. *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956), *reversing*, 96 U.S. App.D.C. 66, 223 F.2d 531 (1954).

[7] The Act of May 30, 1866, 14 STAT. 54, disqualified noncitizens. By Act of June 14, 1902, 32 STAT. 386, the law was amended to disqualify persons not owing allegiance to the United States, "whether citizens or not." The amendment was designed to cover citizens of Puerto Rico, Hawaii, and the Philippines. 35 CONG.REC. 5697-99, 6588-89, 57th Cong., 1st Sess. (1902). The statute is now codified as 22 U.S.C. § 212. For convenience, the class of eligibles will be referred to herein as "citizens."

As authority for his new regulations, the Secretary relied on 22 U.S.C. § 211a,[8] the same statute he had relied on in *Bauer*. He continued this reliance in later cases. In the present case he says: "In the light of the broad language of this statute, there is no occasion here to determine whether the President's plenary executive power over foreign affairs in itself furnishes sufficient authority to the Secretary to deny passports to American citizens in accordance with the reasonable standards prescribed by him."[9] But he adds that "if some additional source of authority were needed, it is supplied by the travel control statutes which Congress has repeatedly enacted";[10] and "the language of the [travel control] statute makes it plain that during [a proclaimed emergency] this authorization becomes incorporated, in effect, into § 211a itself."

But in *Stewart* v. *Dulles*, Nos. 13533, 13622 and 13638, briefed and argued after the present case and now awaiting decision, the Secretary conceded that § 211a "confers no substantive power," and he "assume[d]" that he "had no authority to impose this kind of direct restraint upon travel." "It was for this very reason," he said, "that Congress enacted what is now 8 U.S.C. § 1185, authorizing the President, in times of war or national emergency, to use his inherent powers in the field of passport issuance as a means of directly controlling the travel of citizens." The argument now is that (1) 22 U.S.C. § 211a and the inherent executive power, though ineffective to control travel, give the Secretary discretion as to

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[8] 22 C.F.R. p. 98 (1957 Supp.); 17 FED.REG. 8013.

[9] See also the Secretary's brief in *Boudin* v. *Dulles*, *supra* note 4, at p. 16.

[10] *Supra* note 3.

passport issuance; and (2) under 8 U.S.C. § 1185, upon proclamation of an emergency by the President, any person to whom the Secretary, in his discretion, refuses a passport, may not leave the country. Thus, the Secretary claims that Congress has delegated to him, through the President, the power to establish categories of persons ineligible to leave the country.

I.

The Claimed Delegation

The authority conferred on the President by 22 U.S.C. § 211a was exercised through Executive Order No. 7856, on March 31, 1938.[11] The Executive Order designated only one general category of passport eligibility, that created by 22 U.S.C. § 212, namely, persons who are citizens of the United States. 22 C.F.R. § 51.2 (1949). Beyond that, the order confined itself to specifying the formal requirements of the passport application (*e.g.*, the type and size of photographs to be attached), *id.*, § 51.23q, and the evidence of citizenship to be furnished, and providing for amendment, renewal and extension of passports and specifying the fees to be collected. In addition, it authorized the Secretary of State, "in his discretion to refuse to issue a passport . . ." and "to make regulations . . . additional to the rules in this part and not inconsistent therewith." *Id.*, §§ 51.75, 51.77. Pursuant to this latter authority, the Secretary, on the day of the President's order, issued Departmental Order 749, promulgating the Department's regulations, consisting merely of procedural implementation of the President's rules.[12]

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[11] 3 FED.REG. 799, 22 C.F.R. §§ 51.1 - 51.77 (1949).

[12] 22 C.F.R. §§ 51.101 - 51.134 (1949); and see source note at p. 103. "A study of the executive order and the depart-

The regulations in question in the present case, which the Secretary added four years later and after the *Bauer* decision, were the first attempt, by regulations issued under 22 U.S.C. § 211a, to affect anything more than procedure or form.[13] In view of the purely procedural nature of the President's rules, his accompanying grant to the Secretary of authority to make "additional . . . and not inconsistent" regulations confers no power to create substantive disqualifications.

Nor did the President's Proclamation No. 3004,[14] making operative the travel control provision of 8 U.S.C. § 1185, give the Secretary this authority. Section 1185 prohibits departure from the United States without a valid passport during a proclaimed emergency, "except as otherwise provided by the President, and subject to such limitations as the President may authorize and prescribe . . . ." When the proclamation was issued, regulations existing under an earlier proclamation were in force, providing generally that no person could enter or leave the country without a valid passport, except for travel to and from certain countries. 22 C.F.R. §§ 53.1, 53.9 (1949). Proclamation No. 3004 did not undertake to grant power to the Secretary to control travel by establishing additional categories of passport ineligibility. It merely declared that departure and entry would be sub-

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mental order indicates that the chief element in the discretion exercised by the Secretary of State concerned the type of proof required to establish citizenship or allegiance." Note, 41 GEO.L.J., *infra* note 28, at 76.

[13] See Department of State, THE AMERICAN PASSPORT, ch. IV (1898); Exec. Order No. 654, June 13, 1907; Exec. Order No. 4359-A, Dec. 19, 1925; Exec. Order No. 4382-A, Feb. 12, 1926; Exec. Order No. 4488, Aug. 3, 1926; Exec. Order No. 5860, June 22, 1932; Exec. Order No. 6650, March 23, 1934.

[14] *Supra* note 3.

ject to the already *established travel control regulations, 22 C.F.R. §§ 53.1-53.9, referring to them specifically and incorporating them into the proclamation.*[15] It added an authorization to the Secretary "to revoke, modify or amend such regulations as he may find the interests of the United States to require." This authorization, like the authorization of Executive Order No. 7856 to issue "additional" *passport* regulations, must be read in its context. Thus read, it grants the Secretary discretion of the type already exercised in his existing travel control regulations, namely, to determine which parts of the world can be visited by Americans only if they have passports, but not to determine which Americans are to receive passports.

Thus neither Executive Order No. 7856, which confers upon the Secretary authority received by the President under 22 U.S.C. § 211a, nor Proclamation No. 3004, which confers upon the Secretary authority the President holds under 8 U.S.C. § 1185, undertakes to delegate to the Secretary any power to create substantive passport disqualifications.

Nor could the President delegate such power, for neither statute conferred it upon him.

II.

The President's Statutory Power

A. The Passport Statutes Do Not Purport to Confer the Power Here Claimed.

Section 211a of 22 U.S.C. says nothing about categories of ineligibility. Indeed, the Secretary concedes that the

[15] The regulations involved in this case, which were also in existence when the proclamation was issued, were not referred to directly or indirectly.

purpose of the Act of August 18, 1856,[16] from which § 211a derives, was to prohibit passport issuance by anyone other than the Secretary of State. Nothing in the legislative history of the 1856 statute suggests that the words "may grant and issue" confer power to set up substantive categories of ineligibility. From the little that history reveals, it appears that the purpose of Congress was merely to control the procedure of passport issuance.[17] Fairly read, § 211a grants the Executive only such discretion as may be necessary for elaborating a procedure for issuing passports, *e.g.*, as to the type and quantum of evidence of citizenship.[18] And so the statute was read by our Presidents in former times.[19]

Nor did 8 U.S.C. § 1185 authorize the President to create such substantive passport disqualifications as are contained in the regulations before us. Subsection (a) of § 1185 did not purport to give the President power to establish criteria for restricting anyone's right to travel. It merely authorized him to invoke restrictions set forth in the statute if he found that "those provided otherwise than by this section" were inadequate to protect the public safety. Moreover, when the Act was first adopted in 1918 and when it was reenacted in 1941,[20] there were no restrictions on citizens' travel "provided otherwise than

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[16] 11 STAT. 60; reenacted in substantially the same form by the Act of July 3, 1926, c. 772, § 1, 44 STAT. 887. The language of the original act was "shall be authorized to grant" rather than "may grant," but the effect is the same.

[17] Comment, 23 U.CHI.L.REV., *infra* note 28, at 272 n. 25; Doman, *A Comparative Analysis: Do Citizens Have the Right to Travel*, 43 A.B.A.J. 307, 308 (1957).

[18] The original 1856 Act, 11 STAT. 60, combined the present § 211a with the present § 212 which disqualifies noncitizens.

[19] *Supra* note 13.

[20] *Supra* note 3.

by this section." What Congress had in mind, therefore, in § 1185(a), was the problem of movements of *aliens*, not citizens. And Congress set forth, in subparagraphs (1) through (7) of subsection (a), a system of exit and entry permits to control movements of aliens.

It is subsection (b) of § 1185 which is relevant to citizens. That subsection provided that, upon issuance of the President's proclamation, "it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen to depart from or enter, or attempt to depart from or enter, the United States unless he have a valid passport." Thus citizens were forbidden to travel without passports, but the President was authorized to establish conditions and exceptions to this prohibition. But the subsection did not authorize the President to decide which categories of citizens might receive passports.

Though neither 22 U.S.C. § 211a nor 8 U.S.C. § 1185 explicitly confers the authority the Secretary claims, he urges us to read them through a wide lens and find in them a congressional intent to authorize his regulations. His contention comes to this, that Congress has by implication, though not expressly, authorized the Executive to decide which Americans shall be confined within our boundaries. In my opinion such an intention may not be read into the statutes because (1) it would conflict with other expressions of congressional policy and (2) it would raise grave constitutional doubts.

B. The Secretary's Reading of the Statutes Conflicts with Congressional Policy.

Almost a century ago, Congress declared that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness," and decreed that "any declaration, instruction, opinion, order,

or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government." 15 STAT. 223-224 (1868), R.S. § 1999, 8 U.S.C. § 800 (1940).[21] Although designed to apply especially to the rights of immigrants to shed their foreign nationalities, that Act of Congress "is also broad enough to cover, and does cover, the corresponding natural and inherent right of American citizens to expatriate themselves." *Savorgnan* v. *United States*, 338 U.S. 491, 498 n. 11 (1950).[22] The Supreme Court has held that the Citizenship Act of 1907 and the Nationality Act of 1940 "are to be read in the light of the declaration of policy favoring freedom of expatriation which stands unrepealed." *Id.* at 498-99. That same light, I think, illuminates 22 U.S.C. § 211a and 8 U.S.C. § 1185. Since expatriation is today impossible without leaving the country,[23] the policy expressed by Congress in 1868 and never repealed precludes a reading of the passport and travel control statutes which would permit the Secretary of State to prevent citizens from leaving.

The Secretary's construction of the statutes would impinge also upon the Internal Security Act of 1950.[24] Congress there made it unlawful for a member of a Communist organization to apply for or use a passport, but only after such organization has registered under the Act or has been finally ordered to do so. Neither of those events has occurred.[25] Moreover, the prohibition was

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[21] This act, though no longer included in the United States Code, has not been repealed and is still in effect. *Savorgnan* v. *United States*, 338 U.S. 491, 498-99 (1950).

[22] See also *op. cit. supra* note 1, p. 163.

[23] 8 U.S.C. §§ 1481 and 1483 (1952); *Savorgnan* v. *United States*, 338 U.S. at 503.

[24] *Supra* note 6.

[25] *Ibid.*

circumscribed by procedural safeguards not found in the Secretary's "Communist supporter" regulations involved here; and it was substantively limited to "members" of the proscribed organization, whereas the Secretary's regulations apply "regardless of the formal state of [the applicant's] affiliation with the Communist party . . . ."[26] These declarations of congressional policy make it unlikely that by other statutes Congress intended to authorize a different policy.[27] "The legislative process is especially qualified and the administrative process is especially unfit for the determination of major policies that depend more upon emotional bent and political instincts than upon investigation, hearing and analysis." Davis, ADMINISTRATIVE LAW 57 (1951).

I would not construe the statutes as conferring upon the Secretary by implication broad powers which they do not explicitly confer, *United States* v. *Minker*, 350 U.S. 179, 190 (1956), especially when serious restraints on liberty are entailed. *Ex parte Endo*, 323 U.S. 283, 299-300 (1944).

C. The Secretary's Reading of the Passport Statutes Is Constitutionally Doubtful.

The broad construction the Secretary would have us place on the passport statutes would raise grave constitutional doubts.[28] Statutes must be construed narrowly

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[26] In the last session of Congress, legislation was introduced by Representative Walter, which would have amended the Administrative Procedure Act to provide for a passport review procedure and would have denied passports to persons under Communist discipline in much the fashion now employed by the State Department. The bill died in committee. H.R. 9991, 102 CONG.REC. 4266, 84th Cong., 2d Sess., March 15, 1956.

[27] See Note, 41 GEO.L.J., *infra* note 28, at 89.

[28] Comment, *The Passport Puzzle*, 23 U.CHI.L.REV. 260-

if to do so avoids a serious constitutional question. *United States* v. *Rumely*, 345 U.S. 41, 46 (1953); *United States* v. *Witkovich*, 25 U.S.L. WEEK 4266, 4269, April 30, 1957.

We recognized in *Shachtman* that the individual's right to travel is a natural right protected by the Constitution.[29] Since denial of a passport now abridges that right, pasport applicants are entitled to both the procedural[30] and substantive[31] safeguards of the Fifth Amendment. The broad interpretation urged by the Secretary would require us to decide whether it is consistent with due process of law, and with First Amendment rights,[32] to deprive an individual of so large a part

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(1956); Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 GEO.L.J. 63, 88 (1952); Note, *"Passport" Denied": State Department Practice and Due Process*, 3 STAN.L.REV. 312 (1951); Parker, *The Right to Go Abroad: To Have and to Hold a Passport*, 40 VA.L. REV. 853, 870 (1954); *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L.J. 171 (1952).

[29] 96 U.S.App.D.C. at 290, 225 F.2d at 941. See also *Williams* v. *Fears*, 179 U.S. 270, 274 (1900), referring to "freedom of egress from the State."

[30] *Dayton* v. *Dulles*, *supra* note 4; *Boudin* v. *Dulles*, *supra* note 4; *Bauer* v. *Acheson*, *supra* note 3; see also *Dulles* v. *Nathan*, *supra* note 4, remanding *Nathan* v. *Dulles*, 129 F.Supp. 951 (D.D.C. 1955), for vacation of judgment and dismissal of complaint on ground of mootness.

[31] *Shachtman* v. *Dulles*, *supra* note 2; see *Kraus* v. *Dulles*, 98 U.S.App.D.C. 343, 235 F.2d 840 (1956).

[32] In saying in the *Communist Party* case "that the Government may validly decline" a passport to a Communist, this court was referring to the passport in its aspect as a documentary assurance of "the protection and good offices of American diplomatic and consular officers abroad," 96 U.S. App.D.C. 66, 90, 223 F.2d 531, 555 (1954), and not as an exit permit indispensable to travel. As for the latter aspect

of his liberty under the standards and procedures the Secretary employs; and whether, if Congress possesses such power, it may validly delegate to the Secretary or the President a "discretion . . . unconfined and vagrant . . . [not] canalized within banks that keep it from overflowing."[33]

The word "Communist" is not an incantation subverting at a stroke our Constitution and all our cherished liberties. If today the threat of Communism justifies confining within our boundaries any citizen who will not swear that he is not a Communist,[34] tomorrow the same logic

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of a passport, *i.e.*, whether a restriction upon liberty to travel is constitutional, the court said, ". . . we need not, and do not, enter upon consideration of that question . . . ." 96 U.S.App.D.C. at 91, 223 F.2d at 556. Later in *Shachtman*, the court did consider that question and concluded, as we have already seen, that there is a constitutionally protected right, *supra* note 29; but how much protection springs from the First Amendment has not been determined.

[33] Mr. Justice Cardozo dissenting in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440 (1935). The Secretary argues that standardless delegation is not invalid in a field where the Executive possesses inherent power, citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). As I shall show, however, the delegation problem cannot thus be avoided, for the authority here claimed is not encompassed within the President's inherent power in the field of foreign relations.

[34] The majority finds "nothing new or novel about requiring an applicant for a permit or a license to supply pertinent information under oath." But the analogy sought to be established founders upon the hard fact that the passport applicant does not seek a permit or a license—he seeks to implement a constitutionally protected *right*. The requirement of the affidavit is also sought to be defended by analogy to ordinary pleading rules. But this analogy also collapses. Pleadings may be in the alternative; they may be inconsistent or hypothetical; they are not under oath. A defendant is not required to submit to a test oath as a qualification of his right to receive justice.

will justify control of movement from one state to another, for that is no less useful in communication than travel abroad. By no great extension of the court's reasoning, an oath can be required as a condition to the enjoyment of every other right we have. Food, clothing, shelter, education, recreation—all help to sustain the individual, develop his powers, and make him a more dangerous antagonist.

The due process problem is not avoided by reliance upon *Galvan* v. *Press*, 347 U.S. 522 (1954); nor the First Amendment problem by reliance upon *American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950).

In holding in *Galvan* that Congress could constitutionally provide for deportation of an alien who becomes a Communist after entry, the Supreme Court said: "The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security."[35] The greater power which the Government possesses in respect of aliens[36] may legitimatize treatment which could not lawfully be directed against citizens. *Galvan* provides no constitutional basis for banishing a *citizen* who becomes a Communist.

So far as the First Amendment problem is concerned, whether we apply the "clear and present danger test,"[37] or some aspect of the "reasonable relation" test,[38] we are engaged in weighing the individual's need to be free against the Government's need to restrain him. Each case is bound to turn on the nature of the freedom involved, the

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[35] 347 U.S. at 530.

[36] See discussion at note 90 *infra* and related text.

[37] *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945).

[38] *Dennis* v. *United States*, 341 U.S. 494, 510 (1951), adopting the statement of Chief Judge Hand below, *United States* v. *Dennis*, 183 F.2d 201, 212 (2d Cir. 1950).

public detriment it conflicts with and the type of restraint imposed. It is unlikely that a case arising in one context will determine a case arising in another. *Douds* falls far short of determining our present problem.

In *Douds* the Court upheld the constitutionality of § 9(h) of the National Labor Relations Act, withdrawing N.L.R.B. privileges from unions whose officers fail to submit non-Communist affidavits. The Court found that, since unions are clothed by Federal law with great powers for good or evil, "the public interest in the good faith exercise of that power is very great." 339 U.S. at 401-02. It observed that (1) "§ 9(h) touches a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint," *id.* at 404; (2) there is no constitutional right to occupy the position of a labor leader in the sense that "the loss of [the] particular position [would be] the loss of life or liberty," *id.* at 409; (3) § 9(h) imposes no direct restraint on freedom of belief or association, since its "discouragements" operate "only against the combination of [particular] affiliations or beliefs with occupancy of a position of great power over the economy of the country," *id.* at 403-04;[39] and (4) § 9(h), if not complied with, makes it not impossible, but only more difficult, for unions to remain effective, *id.* at 390.[40]

Whether travel by Communists is a danger on a par with their occupancy of powerful union offices is at least questionable. Prevention of travel does not prevent communication. Conspirators could still use the mails, cables, telephones, radio and, not least, foreign embassies and consulates in the United States. The discomfiture of a

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[39] See also the concurring opinion of Mr. Justice Jackson.

[40] That some unions have remained powerful and effective without the privileges of the Labor Relations Act is common knowledge.

few individuals who would have to send messages rather than make speeches[41] may not, in the constitutional balancing process, outweigh the citizen's right to travel. On the other side of the scales, it appears that (1) the passport statutes, unlike that in *Douds*, touch not a handful of persons, but many thousands (in the Secretary's view, as many thousands as he may choose to suspect); (2) unlike the statute in *Douds*, these involve a constitutionally protected right to travel; (3) they not only impose what *Douds* called an *indirect* restraint on First Amendment rights by "discouragement" of freedom of belief and association, but also *directly* affect the right to travel which may itself be a First Amendment right;[42] and (4) these statutes make travel not difficult, but impossible.

If the design of the passport statutes, in depriving an individual of the right to travel, is to prevent him from making statements abroad critical of or embarrassing to our policies, or offensive to our political taste, they are the very type of legislation the First Amendment forbids. *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Near* v. *Minnesota*, 283 U.S. 697 (1931).[43] If the statutes bar travel on account of "political affiliations and beliefs," they are expressly condemned in *Douds*: "[such] circumstances

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[41] One of the individuals who has sought in vain for many years to go abroad was recently reported to have sent a "cordial message of greetings" to the Soviet Union which was published in the Communist Party newspaper PRAVDA, and broadcast by the Moscow radio. N.Y. TIMES, Jan. 2, 1957, p. 16, col. 6. "Spies and traitors do not usually travel abroad. Rather, they remain inconspicuously at home, as recent unfortunate cases have amply demonstrated." Parker, *op.cit. supra* note 28 at 873.

[42] Wyzanski, *Freedom to Travel*, THE ATLANTIC MONTHLY, Oct. 1952, 66, 68.

[43] *Ibid.*

[are] ordinarily irrelevant to permissible subjects of government action." 339 U.S. at 391. It is most frequently argued, in justification of the power the Secretary claims, that travel of Communists may serve to promote an international conspiracy. Whether, under the *Dennis*[14] reasoning, that possibility justifies these regulations and puts to rest the constitutional doubts that arise is open to serious question.

Another alleged reason for abrogating the constitutional right to travel is that the American abroad may not only talk, but may also act in ways that conflict with our policies and interests and tend to cause international incidents. The Secretary of State embodies that reason in § 51.136 of his regulations,[15] which is not invoked in this case.

During a recent visit to the United States by a foreign chief of state at the invitation of the President, an American mayor declared that the guest was unwelcome in his city. That announcement could hardly have been more prejudicial to our foreign relations if the mayor had been abroad when he made it. Yet no one has suggested that he could constitutionally have been prevented from making his announcement. At home our citizens are as free to do lawful acts as they are to speak their minds.

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[14] See also *Communist Party* v. *Subversive Activities Control Board*, *supra* note 32.

[15] "*Limitations on issuance of passports to certain other persons.* In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States." 22 C.F.R. § 51.136 (Supp. 1957).

The expectation that they may do things abroad which violate no laws is, I think, an insufficient basis for abrogating their right to leave the country.

If it is the fear of *illegal* conduct which purportedly justifies travel restriction, a factor which may tip the constitutional scale is "the availability of more moderate controls than those which the state has imposed." Mr. Justice Frankfurter, concurring in *Dennis* v. *United States*, 341 U.S. 494, 542 (1951), quoting Freund, On Understanding the Supreme Court. There are penal sanctions against the commission or the attempt or conspiracy to commit espionage, sabotage, treason, sedition and subversion.[46] The Internal Security Act deals with conspiracies to do anything which would substantially contribute to the establishment of a foreign-directed totalitarian dictatorship.[47] For persons who become or remain members of the Communist Party with knowledge of its violent objectives, we have the Communist Control Act of 1954.[48] We have statutes dealing with persons who act as agents of a foreign government,[49] or those who have "correspondence" with a foreign government with intent to influence its measures in relation to disputes or controversies with our Government, or to defeat the measures of the United States.[50] Our law even prohibits leaving the country with intent to avoid prosecution or punishment for certain listed offenses, or to avoid giving testimony in certain criminal proceedings.[51] In that they re-

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[46] 18 U.S.C. §§ 371, 791-97, 2151-56, 2381-90.

[47] 50 U.S.C. § 783.

[48] *Id.*, § 843.

[49] 18 U.S.C. § 951.

[50] *Id.*, § 953.

[51] *Id.*, § 1073.

quire proof of criminality and provide trial by jury, these statutes, despite their severe penalties, are more moderate controls than those the Secretary imposes. He claims that the peril involved in the possible machinations of such persons would justify a statute permitting him to deprive them of the right to travel even though he has no evidence which would justify prosecuting them under any of the penal statutes. I think it very doubtful that a statute could constitutionally grant the power to confine citizens to the country in such circumstances.[32]

Section 1732 of 22 U.S.C. (Supp., 1956) calls upon the

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[32] It has been observed that, since the common law attributes to personal liberty, according to Blackstone, "the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclinations may direct," "the distinction between restriction to a jail, to a city, to a state, or to a nation is merely one of degree." Comment, 61 YALE L.J. *supra* note 28, at 190; see also Doman, *op.cit.supra* note 17 at 310.

Constitutional safeguards are "especially necessary where the occasion of detention is fear of future misconduct, rather than crimes committed." Mr. Justice Jackson, dissenting in *Shaughnessy* v. *Mezei*, 345 U.S. 206, 225 (1953). In other legal systems, as Mr. Justice Jackson points out, other considerations may govern. He cites the testimony of Herman Göring at the Nuremburg trials:

> ". . . those who had committed some act of treason against the new state, or those who might be proved to have committed such an act, were naturally turned over to the courts. The others, however, of whom one might expect such acts, but who had not yet committed them, were taken into protective custody, and these were the people who were taken to concentration camps. . . . Likewise, if for political reasons, . . . someone was taken into protective custody, that is, purely for reasons of state, this could not be reviewed or stopped by any court." *Id.* at 225-26 n. 8.

President to "use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release" of an American citizen "unjustly deprived of his liberty by or under the authority of any foreign government." The majority says that since "an American with Communist affiliations" who gets into trouble abroad through his "political indiscretion" may invoke this statute, the Secretary of State must have the power to prevent the citizen from going abroad. But the American who becomes embroiled with foreign authorities can only request the aid of his Government; he cannot compel it. *United States ex rel. Keefe* v. *Dulles*, 94 U.S. App.D.C. 381, 384-85, 222 F.2d 390, 393-94 (1954), *cert. denied*, 348 U.S. 952 (1955).

That the purported need to confine citizens to the country is claimed to spring from emergency conditions does not dispense with their constitutional rights.[53] Mr. Justice Jackson pointed out in his concurring opinion in *Youngstown Sheet & Tube Corp.* v. *Sawyer*, 343 U.S. 579, 649-50 (1952):

> The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emer-

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[53] The Emergency Detention Act of 1950 (Title II of the Internal Security Act), to deal with "fifth column" problems, authorizes the President, in time of invasion, declared state of war or insurrection in aid of a foreign enemy, to proclaim an "Internal Security Emergency" and to apprehend and detain persons as to whom there is reasonable ground to believe that they "probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." 50 U.S.C. §§ 812, 813, 64 STAT. 1021 (1950). The original bill, S. 4130, 81st Cong., 2d Sess. (1950), had contained provisions authorizing detention during such "cold war" emergencies as an "imminent invasion" or a congressionally declared emergency, but these provisions were eliminated because of doubtful constitutionality. Note, *The Internal Security Act of 1950*, 51 COL.L.REV. 606, 651 (1951).

> gency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.

The constitutional questions I have discussed are, in my view, not before us for decision. I mention them, as the Supreme Court said in *Ex parte Endo*, 323 U.S. 283, 299-300 (1944), " . . . not to stir the constitutional issues which have been argued at the bar but to indicate the approach which [I] think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. . . . We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

III.

The President's Inherent Power.

The Secretary of State has always treated it as a matter within his own discretion whether he would give a travelling citizen a document surrounding him with the aura of this Government's protection and commending him to other governments. In *Shachtman* we noted the authorities "which have recognized a great breadth of Executive authority and discretion" in this regard.[54] But, we pointed out: "Now it is unlawful for a citizen to travel to Europe and impossible to enter European countries without a passport."[55] The question is whether the

[54] 96 U.S.App.D.C. at 289, 225 F.2d at 940.

[55] 96 U.S.App.D.C. at 290, 225 F.2d at 941.

Executive has power, by withholding a passport, to confine a citizen within the United States. The Constitution grants no such power. But the Secretary purports to find it in "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . " *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

Numerous cases both before and after *Curtiss-Wright* support the proposition that the President has broad powers in the field of foreign relations. But there is a great gulf between the powers involved in those cases and the power the Secretary claims here. Those cases all relate in some direct fashion to the Executive's traditional power to do things which depend upon negotiations with foreign sovereignties or which bear directly upon our relations with foreign governments. What the Court upheld in *Curtiss-Wright* was the President's "power to negotiate with foreign governments."[56] It sustained delegation to the President of the function of declaring an embargo of munitions sales, because the function was to be exercised "after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as [the President] may deem necessary . . . ."[57] The other cases have recognized that it is for the Executive, or the Executive with Congress, free from judicial interference, to deal with such matters as recognition of for-

[56] Mr. Justice Clark concurring in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 661 n. 3. See the authorities collected in *Z & F Assets Realization Corp.* v. *Hull*, 72 App. D.C. 231, 114 F. 2d 464 (1940).

[57] 48 STAT. 811 (1934).

eign governments,[58] assessment of treaty obligations,[59] resolution of disputed sovereignties,[60] acquisition of new lands,[61] exclusion[62] or expulsion[63] of aliens, imposition of emergency controls over alien property,[64] establishment of an international war crimes tribunal,[65] allocation of an international air route,[66] or creation of an international "Mixed Claims Commission."[67] None of the

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[58] *United States* v. *Palmer*, 3 Wheat. 610, 633-34 (1818); *Jones* v. *United States*, 137 U.S. 202 (1890); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918); *United States* v. *Belmont*, 301 U.S. 324, 330 (1937); *United States* v. *Pink*, 315 U.S. 203, 229 (1942); *Latvian State Cargo & Passenger S.S. Co.* v. *McGrath*, 88 U.S.App.D.C. 226, 188 F.2d 1000, *cert. denied*, 342 U.S. 816 (1951).

[59] *Ware* v. *Hylton*, 3 Dall. 1, 9, 260 (1796); *Doe* v. *Braden*, 16 How. 635, 657 (1853); *Terlinden* v. *Ames*, 184 U.S. 270 (1902); *Ivankevic* v. *Artukovic*, 211 F.2d 565, 573 (9th Cir. 1954).

[60] *Foster* v. *Neilson*, 2 Pet. 253, 307-09 (1829); *Williams* v. *The Suffolk Ins. Co.*, 13 Pet. 414 (1839); *In re Cooper*, 143 U.S. 472 (1892); *The Kodiak*, 53 Fed. 126 (D.Alaska 1892).

[61] *Wilson* v. *Shaw*, 204 U.S. 24 (1907); Mr. Justice Frankfurter, dissenting in *United States* v. *California*, 332 U.S. 19, 45 (1947).

[62] *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950).

[63] *Carlson* v. *Landon*, 342 U.S. 524, 531 (1952); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587-90 (1952).

[64] *United States* v. *Von Clemm*, 136 F.2d 968, 970 (2d Cir. 1943).

[65] Mr. Justice Douglas, concurring in *Hirota* v. *Shaughnessy*, 338 U.S. 197, 208 (1949).

[66] *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948).

[67] *Z & F Assets Realization Corp.* v. *Hull*, 72 App.D.C. 231, 114 F.2d 464 (1940), *affirmed*, 311 U.S. 470 (1941).

"foreign affairs" cases, it has been observed, "involved a situation where the Executive action was specifically directed at restraining the freedom of a particular individual."[68] Chief Justice Marshall, describing those Executive powers which are beyond judicial control and citing the foreign affairs power as an example, said: "The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive."[69] *Marbury* v. *Madison*, 1 Cranch 137, 166 (1803). A characteristic of the political power which is to be exercised free of judicial interference is its "lack of satisfactory criteria for a judicial determination." *Coleman* v. *Miller*, 307 U.S. 433, 454-55 (1939).[70] By this test I think it clear that the

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[68] Comment, 61 YALE L.J. at 187. The *Chicago & Southern Air Lines* case, *supra* note 66, is not an exception. The Court there held that the President's selection of one applicant over another for an international air route was not to be interfered with, because "both as Commander-in-Chief and as the Nation's organ for foreign affairs, [he] has available intelligence services whose reports are not and ought not to be published to the world." 333 U.S. at 111. "The Court evidently was assuming that any secret information the President may have relied upon was in the nature of legislative facts and not adjudicative facts—that the information pertained to international relations and not to qualifications of the particular applicants. . . . . Thus an applicant for a license is entitled to a trial type of hearing on issues of fact concerning his qualifications but not necessarily on issues of fact concerning need for the service or conditions in the territory to be served." Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV.L.REV. 193 at 264, 275 (1956).

[69] That the executive power with respect to passports is not of this conclusive character was settled in *Perkins* v. *Elg*, 307 U.S. 325, 349-50 (1939).

[70] See also the *Chicago & Southern Air Lines* case, *supra* note 66, at 111.

power the Secretary asserts here is not a political power.[71]

The Secretary finds authority to abridge the right to travel in what *Curtiss-Wright* recognized as an inherent executive power to deal with "a situation entirely external to the United States, and falling within the category of foreign affairs . . . ." 299 U.S. at 315. Extending to internal affairs the President's inherent power over external affairs has dangerous implications.[72] Those im-

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[71] "The validity of restrictions on the freedom of movement of particular individuals, both substantively and procedurally, is precisely the sort of matter that is the peculiar domain of the courts." Comment, 61 YALE L. J. at 187. The Secretary's position that "the issuance and denial of passports is within the field of conducting foreign policy" has been described by one commentator as "[a] strange, and to this writer's knowledge, unique position among the countries with democratic and constitutional background." Doman, *op.cit. supra* note 17, at 309.

[72] Madison wrote to Jefferson in 1798:

> "The management of foreign relations appears to be the most susceptible of abuse of all the trusts committed to a Government, because they can be concealed or disclosed, or disclosed in such parts and at such times as will best suit particular views; and because the body of the people are less capable of judging and are more under the influence of prejudices, on that branch of their affairs, than of any other. Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad." Padover, THE COMPLETE MADISON (1953) 257-58.

Mr. Justice Jackson, concurring in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 642, declared:

> " . . . no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."

plications have caused some authorities to shrink from the inherent power doctrine as from something "revolutionary and subversive of our constitutional system";[73] or to anticipate from it a carry-over to our national government of all the royal prerogatives which ancient common law associated with the foreign affairs powers of the King of England;[74] or to fear that it "would, at a stroke, equip the Federal Government with every power possessed by any other sovereign State."[75] In our com-

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[73] Patterson, *In re the United States* v. *The Curtiss-Wright Corporation*, 22 TEXAS L.REV. 286 (1944).

[74] Goebel, *Constitutional History and Constitutional Law*, 38 COL.L.REV. 555, 571-72 (1938). In token that his fears are not fanciful, Professor Goebel cites *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276-77 (1855), where Mr. Justice Curtis, in upholding the right of the Solicitor of the Treasury Department to proceed by distraint, without judicial process, against the property of a defalcating customs collector, reasoned that the taking was not without due process of law because at common law the Exchequer could use the writ of *extendi facias* to seize the "goods of the King's debtor . . . without requiring any previous inquisition . . ."

[75] 1 Willoughby, THE CONSTITUTION OF THE UNITED STATES 92 (2d ed. 1929); see also Leviton, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 493 (1946). See the concurring opinion of Mr. Justice Jackson in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 641, replying to the Government's argument that the vesting of "The Executive Power" in the President is a grant of all possible executive power: "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image." One of the evils denounced in the Declaration may have been the King's attempt to prevent emigration to the colonies. Note, 41 GEO.L.J., *supra* note 28, at 70. Even in the earliest co-

plex world there are very few purely internal affairs. Foreign problems cast their shadows on the domestic scene and internal events influence foreign policy. The Department of State has declared that "There is no longer any real distinction between 'domestic' and 'foreign' affairs."[76] If that is so, the inherent power doctrine could produce an extension of the executive power beyond any limits heretofore conceived; and the President, through his Secretary of State could preempt the internal security functions of Congress.

But the Supreme Court has confined the inherent foreign affairs power within accountable limits.[77] I am convinced from my review of the authorities and my study of history that the power here claimed by the Secretary is beyond those limits. *Curtiss-Wright* declares that an extra-constitutional foreign relations power passed to the President from the British Crown. To say that *all* the powers of the Crown devolved upon the President would,

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lonial period, Charles I, in the exercise of the royal prerogative to confine the subject to the realm, issued a proclamation against taking passage to America, because some who were going were "'idle and refractory persons' who wished to live out of reach of authority." 10 Holdsworth, HISTORY OF ENGLISH LAW 390 (1938).

[76] OUR FOREIGN POLICY, Department of State Publication 3972, General Foreign Policy Series 26, Sept. 1950, p. 4.

[77] *Supra notes* 58-67. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 487, the Court said, dealing with the analogous question of the extent of the President's military power: "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities." See also text at notes 95-97, *infra*.

of course, be inconsistent with the basic principle that every branch of the national government has only a limited power, and *Curtiss-Wright* does not even suggest such a thing.[78]

The British Crown had a prerogative to confine subjects to the realm by writs *ne exeat regno*.[79] But it was not one of the prerogatives which devolved upon our President. It had its roots in the Crown's earliest constitutional controversies with the clergy[80] and the barons.[81] By the year 1382, restraints against clerics and notables were relaxed, but a prohibition was placed upon unlicensed departure from the realm by the common subjects of the King. 5 Rich. II, c. 2, §§ 6, 7. In 1607

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[78] A specific royal prerogative, in its devolution upon our national government, may be divided between the executive and legislative branches. See, *e.g.*, 10 OPS. ATT'Y GEN. 452 (1863).

[79] See Note, 41 GEO.L.J. at 64-70.

[80] From the struggles of Henry II with Thomas à Becket emerged, in 1164, the fourth article of the Constitutions of Clarendon prohibiting ecclesiastics from leaving the realm without the king's permission.

[81] John's struggle with the barons culminated, in 1215, in Magna Carta which provided in c. 42:

> "It shall be lawful in future for anyone (excepting always those imprisoned or outlawed in accordance with the law of the kingdom, and natives of any country at war with us, and merchants, who shall be treated as [otherwise] provided) to leave our kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy —reserving always the allegiance due to us."

This provision did not survive John. It was omitted from the confirmation of the Charter in 1217 and the definitive proclamation by Henry III in 1225 which is the Charter's present statutory form. *Supra* note 79 at 67-68; Goebel, *op.cit. supra* note 71, at 573-74 n. 51.

that prohibition was repealed, 4 James I, c. 1, so that ostensibly freedom of travel was restored, except to persons covered by special statutes.[82] It is undeniable, however, that the Crown continued to exercise its prerogative to confine subjects to the realm, at least until about one hundred years before our Revolution.[83]

The manner in which British kings employed *ne exeat* was in some ways strikingly similar to our State Department's present policies and practices. The writ, first used "to hinder the clergy from going to Rome . . ., was afterward extended to laymen machinating and concerning measures against the state . . . ."[84] At one time the class confined to the realm included "all archers and artificers, lest they should instruct foreigners to rival us in their several trades and manufactures."[85] Bacon says the writs were issuable "in respect of attempts prejudicial to the King and State: (in which case the Lord Chancellor will grant them upon prayer of any of the principal Secretaries, without cause, or upon such information as his Lordship shall think of weight) . . . ."[86]

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[82] Largely affecting children sought to be sent abroad for Catholic education. *Supra* note 79, at 69.

[83] Goebel, *op.cit. supra* note 74, at 573-74 n. 51; 10 Holdsworth, *op.cit. supra* note 75, at 391-92.

[84] 1 Blackstone, COMMENTARIES (Wendell's ed. 1854) 266 n. 22.

[85] *Id.* at 265-66.

[86] Ordinances, No. 89, quoted in Beames, NE EXEAT REGNO (1st Amer.ed., 1821) 17. In form, the writ commanded the subject "that he go not beyond the seas or out of the realm without a license" upon the stated ground that "we are given to understand that you design to go privately into foreign parts and intend to prosecute there many things prejudicial to us . . . ." Provision was made whereby the subject could apply to Chancery for a license. Parker, *op.cit. supra* note 28, at 867.

had fallen into disuse,[87] was still part of the king's prerogative when we became an independent nation. The draftsmen of our Constitution were familiar with it through Blackstone, "that handbook of the American revolutionary."[88]

Blackstone divided the prerogatives of the Crown into two general categories: those relating to "intercourse with foreign nations"; and those relating to "domestic government and civil polity." 1 COMMENTARIES (Wendell's ed. 1854) 252. It is the first branch of the royal prerogative to which *Curtiss-Wright* refers and upon which the Secretary here relies.

"With regard to foreign concerns," says Blackstone, "the king is the delegate or representative of his people.

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[87] The writ *ne exeat* has continued to be employed only as a private equitable remedy to prevent flight of creditors. *Supra* note 85; Parker, *op.cit. supra* note 28 at 867-68. In its aspect as a private equitable remedy, it was imported into our law. 1 STAT. 334 (1793); JUDICIAL CODE § 261, 36 STAT. 1162 (1911), 28 U.S.C. § 376 (1940); now covered by Rule 64, FED.R.CIV.P., see Notes of Advisory Committee. The royal prerogative still exists in England, but whether it may be exercised in time of peace is doubtful. Note, 41 GEO.L.J. at 70.

[88] Rutland, THE BIRTH OF THE BILL OF RIGHTS 11 (1955). "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the Federal Constitution it had been published about twenty years; and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it." *Schick* v. *United States*, 195 U.S. 65, 69 (1904). Professor Crosskey refers to the Commentaries as "that great 'best-seller' of the eighteenth century" and points out that some of the members of the Constitutional Convention were on the subscription list of the original American edition in 1772. POLITICS AND THE CONSTITUTION, Vol. 1, p. 411, and Vol. 2, p. 1326, n. 3 (1953).

. . . In the king, therefore, as in a center, all the rays of his people are united . . . ."[89] *Ibid.* The king's foreign affairs prerogative included the following components: (1) "the sole power of sending embassadors to foreign states, and receiving embassadors at home," *id.* at 252-56; (2) making "treaties, leagues and alliances with foreign states and princes," *id.* at 256; (3) "making war and peace," *id.* at 256-57; (4) issuing "letters of marque and reprisal," *id.* at 257-59; and (5) granting "safe conducts" or "passports" to *aliens* coming to the realm, *id.* at 259-60.[90]

The foreign affairs prerogative *did not include the*

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[89] Cf. John Marshall, in an address to the House of Representatives in 1800: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 ANNALS OF CONGRESS, 6th Cong., 1st Sess., col. 613 (1800).

[90] The "passports" referred to in this part of the prerogative are merely "safe conducts" which were issued to visiting strangers "under the king's sign-manual," rather than by one of "his embassadors abroad." *Id.* at 259. This part of the foreign affairs prerogative has been carried over to our Government. See *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950): "The exclusion of aliens is a fundamental act of sovereignty . . . [which] stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." See also *Carlson* v. *Landon*, 342 U.S. 524, 534 (1952); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587-89 (1952); and *Galvan* v. *Press*, 347 U.S. 522, 530 (1954). The majority's reliance upon *Galvan* to support a power to control the movements of *citizens* is thus misplaced. See text at note 36 *supra*.

So far as the rest of the royal prerogative over foreign affairs is concerned, the power to make war and to issue letters of marque and reprisal were confined by our Constitution to the legislative branch, and the sending of ambassadors to and making of treaties with other nations were given to the President, but with a role preserved for the Senate.

power to confine subjects to the realm. This was part of the *domestic prerogative* having to do with *military affairs. Id.* at 265. Blackstone says, *id.* at 262:

> The king is considered . . . as the generalissimo, or the first in the military command, within the kingdom. The great end of society is to protect the weakness of individuals by the united strength of the community; and the principal use of government is to direct that united strength in the best and most effectual manner, to answer the end proposed. Monarchial government is allowed to be the fittest of any for this purpose; it follows, therefore, from the very end of its institution, that in a monarchy the military power must be trusted in the hands of the prince.

And, "because that every man ought of right to defend the king and his realm, therefore the king, at his pleasure, may command him by his writ that he go not beyond the seas, or out of the realm, without license. . . ." *Id.* at 265.

Since the king's *ne exeat* power was part of his domestic military prerogative, rather than his foreign affairs prerogative, *Curtiss-Wright* lends no support to a theory that the power devolved upon our President.

It is plain that our Constitution, with respect to things military, conveyed to Congress most of the powers which were the king's prerogative;[91] leaving the President only the command function. The President's military power, said Hamilton, "would amount to nothing more than the supreme command and direction of the military and naval forces, a first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies; all of which, by the Constitution under consideration,

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[91] *E.g.*, "to raise and support Armies," "to provide and maintain a Navy," "to make rules for the government and regulation of the land and naval forces," the various militia powers, and the authority to legislate with respect to places "for the erection of forts, magazines, arsenals, dock-yards and other needful buildings." Constitution, Art. I, § 8.

would appertain to the legislature." THE FEDERALIST, No. 69 (Ford ed. 1898), p. 460.[92] Since the American citizen does not owe the President such a duty of defense as the British subject owes his monarch, there is no basis for implying a grant to the President of the *ne exeat* power which might be necessary to enforce such a duty. We owe our duties to the nation, not to its chief executive.[93]

The notion that the President possesses inherent *military* power to deal with internal affairs involving private rights was disposed of in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). The Court ruled that it could not "with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from

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[92] Professor Crosskey points out that St. George Tucker, a Jeffersonian, in his 1803 edition of Blackstone, noted that "the student c[ould] not fail to have remarked how many of the most important prerogatives of the British crown [had been] transferred *from the executive authority*, in the United States, *to the supreme, national council in Congress.*" *Op.cit. supra* note 88 at 415. Crosskey concludes as to the military prerogative: "So, in this whole field in which the powers of the King were so very great—the field of authority from which, if from any, the Convention may have feared a future American monarchy might conceivably arise—the 'supremacy' of Congress was most carefully and amply provided: apart from the bare 'command' in actual action and administration, all the foregoing authorities of the English King, as 'generalissimo,' were specifically transferred to Congress or subjected, in the plainest terms, to Senatorial or Congressional control." *Id.* at 427.

[93] A cognate of the writ *ne exeat* is the writ available to the king to recall a subject to the realm from abroad. *Supra* note 84 at 266. To the extent that this prerogative power passed to our Government, it is lodged not in the President but in Congress. See *Blackmer* v. *United States*, 284 U.S. 421, 437-38 (1932).

stopping production." *Id.* at 587. Mr. Justice Douglas, concurring, declared that "our history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs." *Id.* at 632. Mr. Justice Jackson added: "That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history. . . . [The President's] command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress." *Id.* at 644, 645-66.[94]

At the time of *Youngstown* our Armed Forces were engaged in active combat in Korea. The record before the Court contained a number of affidavits by high Government officials, typical of which was that of the Secretary of Defense, which stated:

> . . . any curtailment in the production of steel even for a short period of time will have serious effects on the programs of the Department of Defense which are essential to national security. A work stoppage in the steel industry will result immediately in serious curtailment of production of essential weapons and munitions of all kinds; if permitted to continue it would weaken the defense effort in all critical areas and would imperil the safety of our fighting men and that of the nation.

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[94] The executive absolutism implicit in the royal prerogative has its counterpart in modern systems of government which, though formally representative, differ from ours in basic philosophy. Thus, under the Venezuelan theory of "cesarismo democratico," the president is "democracy personified, the nation made man" and his "influence and power . . . extend to all levels of government. . . ." Lott, *Executive Power in Venezuela*, 50 THE AMERICAN POLITICAL SCIENCE REVIEW 422, 425, 440 (1956).

Chief Justice Vinson, dissenting, thought "the uncontroverted affidavits in this record amply support the [President's] finding that 'a work stoppage would immediately jeopardize and imperil our national defense.'" *Id.* at 679. He also cited our numerous international undertakings—United Nations, Korea, Truman Plan, Marshall Plan, North Atlantic Treaty Organization and Mutual Security—all of which might be imperilled if the President's seizure were not upheld. *Id.* at 668-72. He found support for the seizure not only in the President's military power and in his foreign relations power, *id.* at 679, 681, but also in the fact that the emergency required emergency action. *Id.* at 668, 708-10. The Court, however, repudiated these views. It held that the seizure of steel mills involved in labor strife was within Congress' "exclusive constitutional authority . . . in both good and bad times." *Id.* at 588-89.

The military power has in the past been argued to be broad enough to subject to court-martial civilians who obstruct the successful prosecution of hostilities.[95] But, as Professor Edmund M. Morgan pointed out: "Every act of treason would, by this reasoning, be punishable by court-martial, and the third section of article III of the constitution would have no field of operation."[96] When, during World War I, legislation was offered to subject all spies to court-martial, on the theory that the whole of the United States was a war zone, President Wilson said: "I think that it is not only unconstitutional, but that in character it would put us upon the level of the very people we are fighting and affecting to despise."[97]

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[95] Winthrop, MILITARY LAW AND PRECEDENTS (2d ed. 1920) 103.

[96] Morgan, *Court Martial Jurisdiction Over Non-Military Persons Under the Articles of War*, 4 MINN. L. REV. 79, 106 (1920).

[97] Rankin, WHEN THE CIVIL LAW FAILS (1939) 138-39.

IV.

Conclusion

My conclusions are that (1) the President has not delegated to the Secretary of State the power to decide which Americans may travel and which may not; (2) neither of the two statutes relied on by the Secretary as a source of such power—22 U.S.C. § 211a and 8 U.S.C. § 1185—grants the power, in terms, either to the President or to the Secretary; (3) a construction of either or both of the statutes as granting the power would conflict with other expressions of congressional policy and would raise constitutional doubts of the utmost gravity, especially to the extent that eligibility is made to depend upon matters of political belief and association; (4) since the power was not conferred by statute, the President does not possess it, for it is not one of the powers inherent in his office.

The broad power to curtail the movements of citizens of the United States, to the extent that our Government possesses it, *is vested in Congress, not in the President.* Travel is being controlled today for purposes of internal security. To call it a matter of foreign relations is mere pretense. Whether our internal security requires the drastic measure of restricting travel and, if so, to what extent and by what criteria and procedures is for Congress to decide. If and when Congress acts, there will presumably be hearings, reports and debates which may serve to limit what Congress elects to do and may help to interpret what it does. The constitutionality of any such measure will, of course, depend on its provisions and the circumstances in which it is enacted.

The question before us is whether the Secretary of State has power to establish such substantive criteria for travel as are here involved. We need not decide and I do not say that there are no circumstances under which the Secretary may restrain a citizen's travel. Whether

he may deny a passport to prevent a flight from justice[98] or in aid of the enforcement of some specific law, *e.g.*, the Universal Military Training and Service Act,[99] are questions that may arise in other cases. In any event, the exercise of such powers would be a far cry from the Secretary's present undertaking.

EDGERTON, *Chief Judge, dissenting:* We have temporized too long with the passport practices of the State Department. Iron curtains have no place in a free world. I think the Secretary should be directed to issue a passport.

"Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by . . . the Constitution." *Williams* v. *Fears*, 179 U.S. 270, 274. We have held that the right to leave the country is an attribute of personal liberty and that restrictions on it "must conform with the provision of the Fifth Amendment that 'No person shall be . . . deprived of . . . liberty . . . without due process of law'." *Shachtman* v. *Dulles*, 96 U.S.App.D.C. 287, 290, 225 F. 2d 938, 941.

But we need not and therefore should not[1] decide any constitutional question. As Judge Bazelon's opinion shows, the President and Congress have not undertaken to delegate to the Secretary the authority he claims. This is very clear when the statutes and executive orders on

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[98] Cf. 18 U.S.C. § 1073.

[99] Act of June 24, 1948, 62 STAT. 604, 50 U.S.C. App. §§ 451 *et seq.*

[1] *Peters* v. *Hobby*, 349 U.S. 331, 338.

which he relies are construed narrowly. Delegations of authority must be construed narrowly when a narrow construction avoids serious constitutional questions. *United States* v. *Rumely*, 345 U.S. 41.

The Secretary proposes to continue restricting the personal liberty of a citizen because statements by informants which the Secretary does not identify have led him to think that if the citizen goes abroad he will do something, the nature of which the Secretary does not suggest, which the Secretary thinks, for reasons known only to him, will be contrary to what, for reasons known only to him, he conceives to be "the national interest". If Congress or the President had undertaken to authorize this, serious constitutional questions would arise. May the government deprive a citizen of his constitutional liberty to go abroad (1) without a jury trial, (2) without a definite standard of guilt, (3) without sworn testimony, and (4) without an opportunity to confront his accusers or know their identity? May it deprive him of this liberty because of the way he has exercised his First Amendment rights of free speech, press, and assembly? Since neither Congress nor the President has undertaken to give the Secretary the authority he claims, we need not consider these constitutional questions.

FAHY, *Circuit Judge, dissenting*: The discretion of the Secretary in issuing passports prior to the enactment in 1941 of 66 Stat. 190, 8 U.S.C. § 1185(b) (1952), see *Shachtman* v. *Dulles*, 96 U.S. App. D.C. 287, 225 F.2d 938, was subject to no clear limitation except that the applicant must qualify as one who owed allegiance to the United States.[1] A passport was in the nature of a political document; one need not have it in order to obtain passage and depart

[1] 32 Stat. 386 (1902), 22 U.S.C. § 212 (1952), which amended 14 Stat. 54 (1866). Under the earlier law only citizens were eligible for passports.

from the United States. So no deprivation of liberty and no justiciable controversy were involved in denial of a passport. But 8 U.S.C. § 1185(b) changed all this. By that statute Congress provided that when the United States is at war or during the existence of any national emergency proclaimed by the President no citizen may lawfully depart from the United States without a valid passport, with exceptions not here pertinent. This was an assertion by Congress of restraint upon travel based upon the war power, coupled with the executive control over passports incident to the conduct of foreign affairs noted in *Shachtman*. The new statute, however, did not enumerate other specific criteria, notwithstanding a passport thenceforth was not merely a political document the denial of which entailed no deprivation of liberty. But I do not think the absence from 8 U.S.C. § 1185(b) of more specific criteria renders nugatory the control in question.[2] The statute explicitly limits the control to a time of war or of a presidentially proclaimed national emergency, and to passports. Control related to the war powers and to the conduct of foreign affairs is thus plainly intended. In order to be validly exercised the powers thus invoked, though subject to the Constitution, are not held to the same degree of legislative or other specificity as are those of government generally. Moreover, we do not have here, as in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, an attempted exercise of executive authority alone; the problem is more like that involved in *Hirabayashi* v. *United States*, 320 U.S. 81, where there was a combination of legislative and executive authority. Here Congress seeks to control travel and to that end

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[2] It seems manifest that control was attempted. No longer was there to be merely the ascertainment of the obligation or not of allegiance. Before 8 U.S.C. § 1185(b) was enacted this qualification was the sole essential. The enactment, therefore, was a definite authorization by Congress of control of the travel of some who had that qualification.

to enlarge the significance of executive control over passports, in time of war or national emergency. When the Act of Congress is considered with the authority of the executive I think the courts would not be justified in entirely nullifying all control other than that incident to ascertainment by the issuing authority of whether or not the applicant owes allegiance to the United States. I am reassured in this view by the fact that the passport to be issued need be only a simple pass or permit which enables the possessor to depart lawfully from the United States, and no more; and, furthermore, the control is always limited by the requirements of the Due Process Clause. *Shachtman* v. *Dulles*, *supra*; *Bauer* v. *Acheson*, 106 F. Supp. 445. Upon these considerations I would interpret the control enacted by Congress as valid when exercised consistently with due process to prevent the reasonable likelihood of harm to our national defense or to the conduct of our foreign affairs. This gives valid content to the Act of Congress, a result to be preferred when reasonably possible, to a holding that Congress has entirely failed in its intended purpose. *Cf. United States* v. *Rumely*, 345 U.S. 41; and *Ullman* v. *United States*, 350 U.S. 442.

We come then to the question whether, taking the above approach, the denial of appellant's application is consistent with due process and satisfies the criteria referred to. In reaching this question I construe the factual situation as amounting to an actual denial of appellant's application on the ground that he refused to file a statement in accordance with section 51.142 of the Passport Regulations, 22 C.F.R. § 51.142 (Supp. 1957). The denial flows from the regulation and not from an independent conclusion of the Secretary with respect either to appellant or to any particular geographical area. The information sought by the regulation is relevant to the criteria by which the Secretary must be guided; for travel abroad at this time by persons who owe allegiance

to the United States but who are or have been members of the Communist Party may reasonably be deemed to be related to the national defense and to the conduct of foreign affairs. It does not follow, however, that refusal by the applicant to furnish this relevant information, without more, brings denial of his application into conformity with due process. It must be borne in mind that the denial deprives him of liberty to depart from the United States, a right which he has unless lawfully deprived thereof. In *Garner v. Los Angeles Board*, 341 U.S. 716, the relevant information which the Court held the applicant must supply was required by law, and was with respect to retaining State employment. These two factual differences are enough I think to distinguish that case from this one. Not only has Congress not specified here that the information refused must be furnished as a condition to obtaining a passport, but the liberty to travel is on a different footing from a desire to retain State employment. In the one case there is the taking away of an existing liberty; in the other there is State control over the qualifications of its employees. And the degree of restraint involved, as well as the nature of the liberty restrained, are pertinent in determining the sufficiency of the reason assigned for the restraint. Furthermore, the failure of appellant to furnish the information may have been in good faith reliance upon the First Amendment, *cf. Konigsberg v. State Bar of California*, 353 U.S. 252, or for other good faith reasons, such as fear of prosecution for making a false statement. Of course the reason may have been that to answer truthfully would have disclosed Communist Party membership and thereby automatically have caused the application to be denied under section 51.135(a) of the Regulations. But we are not required to assume this reason, or now to decide the validity of denial of a passport based on such assumption. It is true, as pointed out in Judge Washington's concurring opinion,

that Congress has declared that travel of Communist members facilitates communication and is a prerequisite for carrying on of activities to further the purposes of the Communist movement. The Secretary cannot be required to assume that a real Communist Party member who is a citizen of or otherwise owes allegiance to the United States, can be relied upon to adhere to his obligation of citizenship when it conflicts with the responsibility he has assumed by Party membership. For this reason a general uncertainly as to the conduct of those involved in Communist membership or discipline has a justifiable place in considering passports. But such general uncertainty is not a substitute for a decision by the issuing authority where, in any event, Party membership or discipline is not shown. An applicant who refuses to file the statement required by section 51.142 may have no derogatory information to supply, or he may need to depart for personal or other reasons unrelated to some possible Communist involvement. Yet the Secretary, though satisfied to either effect, could not permit the departure. Thus to create a general restriction on travel by those who refuse the information, without more, is not reasonable. It prohibits travel by an individual whose own reason to depart does not come within the criteria upon the basis of which the Secretary may validly refuse him permission to depart. The intended travel might be wholly unrelated to any problem of national defense or foreign affairs. To avoid this difficulty a conclusion should be reached by the issuing authority in the individual case, or with respect to the territorial area involved, on the question whether the travel would be reasonably likely to be detrimental to the national defense or to the conduct of our foreign affairs. While the issuing authority may take into consideration the refusal of the applicant to comply with section 51.142, due process is not afforded in peacetime by applying to an individual case the general restriction referred to when there is op-

portunity for a particular judgment. The exigencies of the situation do not require a blanket rule which, for administrative convenience or otherwise, obviates the necessity of a judgment reached by the issuing authority in the individual case. We are not at war. There is a presidentially proclaimed period of national emergency, but we must not construe the authority to be exercised as equal to that available in wartime. To bring the regulation of travel within the requirements of substantive due process, *Shachtman* v. *Dulles*, *supra*, calls I think for the exercise by the issuing authority of its own decisional processes to a greater degree than inheres in denial of a passport through the self-executing effect of an applicant's refusal to supply the information sought by section 51.142 of the Regulations.

Being of the views thus expressed I would reverse and remand, with direction that the case be returned by the District Court to the Secretary for reconsideration consistently with these views and with procedures required by our decision in *Boudin* v. *Dulles*, 98 U.S. App. D.C. 305, 235 F.2d 532.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13297

ROCKWELL KENT, APPELLANT

v.

JOHN FOSTER DULLES, Secretary of State, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

Decided June 27, 1957

Mr. Leonard B. Boudin, with whom *Messrs. David Rein* and *Joseph Forer* were on the brief, for appellant.

Mr. B. Jenkins Middleton, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Mr. Oliver Gasch*, United States Attorney, and *Mr. Paul A. Sweeney*, Attorney, Department of Justice, were on the brief, for appellee. *Mr. Lewis Carroll*, Assistant United States Attorney, also entered an appearance for appellee.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER and BASTIAN, Circuit Judges, sitting *en banc*.

PRETTYMAN, *Circuit Judge*: Rockwell Kent is an artist. On August 2, 1955, he filed with the Department of State an application for a passport to travel to Europe to paint pictures. He stated he desired to visit England, Ireland,

France, Switzerland, Denmark, Norway, Sweden, Finland, Italy and Czechoslovakia, the stated purpose being "prosecution of profession and pleasure." The Director of the Passport Office wrote him under date of September 29, 1955, referring to the action of the Department upon a prior application. Upon receipt of that prior application, executed June 1, 1955, the Department had written him that it was obliged to disapprove the request tentatively, on the ground that the grant was precluded under Section 51.135 of the Department's Passport Regulations.[1] The letter of the Department continued: "In your case it has been alleged that you were a Communist." Thereafter the letter contained a long (four printed pages in the joint appendix before us) recital of affiliations with Communist-front organizations, espousals of the Communist cause, and participation in Communist activities. He was advised that he would be required, as a prerequisite to a hearing on his application, to submit a sworn statement as to whether he was then or ever had been a Communist.

On October 27, 1955, counsel for Mr. Kent wrote the Department that his client had taken the position that the demand for an affidavit was unlawful and that he would not respond to such demand. However, on November 8, 1955, an informal hearing was held in the Passport Office, at which hearing Mr. Kent appeared with counsel. In the course of the hearing the Department put certain evidence in the record, principally a copy of Mr. Kent's book, *It's Me O Lord*, an autobiography. Mr. Kent conceded that anything in the book is accurate. Portions of the book were read into the record. In the course of that hearing Mr. Kent was asked a question directed at each subdivision of Section 51.135 of the Passport Regulations. He was asked whether he would submit a sworn

[1] 17 FED. REG. 8013 (1952), 22 C.F.R. § 51.135 (Supp. 1955).

statement as to whether he was or was not a member of the Communist Party, a sworn statement bearing on subsection (b) of the regulation, or a sworn statement as to membership in Communist-front organizations. He refused to submit any such sworn statement. He summarized his position thus: "* * * because I am an American citizen I am entitled to a passport, stop."

On November 25, 1955, the Director of the Passport Office wrote Mr. Kent, referring to his declining to furnish a statement respecting his then-present or past membership in the Communist Party, his alleged affiliation with Communist-front organizations, and other alleged Communist activities. The letter concluded:

> "The Department will be glad to give further consideration to your passport application at such time as you are willing to comply with the Passport Regulations."

Mr. Kent thereupon filed in the District Court a complaint for declaratory judgment and injunction. The Secretary answered. The plaintiff then moved for preliminary injunction and for summary judgment, and the Secretary moved for judgment on the pleadings or for summary judgment. In a brief opinion the District Court held that the passport regulations are valid and reasonable. It denied the plaintiff's motions and granted the Secretary's motion for summary judgment. This appeal followed.

It is stated to us by both the appellant and the appellee that the issues in this case are identical with the issues in *Briehl v. Dulles*, decided by this court today.[2] The members of the court vote in this case as they voted in that one and adhere to the opinions filed by them in that case. Accordingly Judges Prettyman, Wilbur K. Miller, Washington, Danaher and Bastian vote to affirm. Chief Judge Edgerton and Judge Bazelon vote to reverse. Judge Fahy

[2] —— U.S. App. D.C. ——, —— F.2d ——.

votes to reverse and to remand for further proceedings before the Secretary consistently with the views set forth in his opinion in *Briehl*.

Affirmed.

BURGER, *Circuit Judge*, took no part in the consideration or decision of this case.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 481

ROCKWELL KENT and WALTER BRIEHL,
Petitioners,

v.

JOHN FOSTER DULLES, Secretary of State.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

October Term, 1957

No. 481

ROCKWELL KENT and WALTER BRIEHL,
Petitioners,

v.

JOHN FOSTER DULLES, Secretary of State.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals in *Briehl* v. *Dulles* (R. 171-246) is reported at 248 F. 2d 561. *Kent* v. *Dulles*, which adopted the reasoning of *Briehl*, is reported at 248 F. 2d 600 (R. 87-90). The opinions of the District Court are not reported; they appear at R. 169 and R. 84 respectively.

Jurisdiction

The judgments of the Court of Appeals were entered on June 27, 1957 (R. 91 (*Kent*); 247 (*Briehl*)). The petition for certiorari was filed on September 18, 1957, and certiorari was granted on November 25, 1957 (R. 253). The jurisdiction of the Court rests on 28 U. S. C. § 1254 (1).

Statutes and Regulations Involved

The statutes involved are the Act of July 3, 1926, c. 772, § 1, 44 Stat. 887, 22 U. S. C. § 211a; the Internal Security Act of 1950, § 6, 64 Stat. 993, 50 U. S. C. § 785; the Immigration and Nationality Act of 1952, § 215 (a), 66 Stat. 190, 8 U. S. C. § 1185; and the Expatriation Act of 1868, 15 Stat. 223-224, R. S. § 1999. The pertinent provisions of these statutes are reproduced in the Appendix, *infra*, pp. 59-61.

The principal regulations involved are 22 CFR § 51.135 and § 51.142, which read as follows:

> § 51.135 *Limitations on Issuance of Passports to Persons Supporting Communist Movement.*. In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:
>
> (a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party;
>
> (b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to wararnt the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;
>
> (c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage

in activities which will advance the Communist movement for the purpose, knowingly and willfully of advancing that movement.

§ 51.142 *Oath or Affirmation by Applicant as to Membership in Communist Party.* At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.

Other pertinent passport regulations are reproduced in the Appendix, *infra*, pp. 66-78.

Questions Presented

1. Whether the Secretary of State is authorized by law to condition the issuance of passports to American citizens on their meeting political standards devised by him.

2. Whether the Secretary's passport regulations (22 CFR 51.135-51.170, hereinafter referred to as "the passport regulations"), are invalid because they are not authorized by Congress and because they conflict with controlling statutes, *viz.*, section 6 of the Internal Security Act of 1950, 64 Stat. 993, 50 U. S. C. § 785; and the Expatriation Act of 1868, 15 Stat. 223-224, R. S. § 1999.

3. Whether the passport regulations, on their face and as applied to petitioners, abridge First Amendment rights of speech, belief and association; constitute a bill of attainder and an *ex post facto* law in violation of Article I, section 9, of the Constitution; and deprive petitioners of their rights of travel and to due process under the Fifth Amendment.

Statement of the Case

A. The Proceedings in the Passport Office

These cases arise as a result of the refusal of the Secretary of State to issue passports to the petitioners. The events which culminated in the denial in each case are as follows:

(1) Dr. Walter Briehl

Dr. Walter Briehl has been a practicing psychiatrist for twenty-seven years (R. 108). He is associated with many psychiatric hospitals and clinics and has taught psychiatry (R. 108). During the war he had the rank of Lieutenant-Colonel and served as Chief Psychiatrist in several Army hospitals (R. 109).

Dr. Briehl is a member of leading professional societies in the fields of medicine and psychiatry. As their representative he attended conventions on mental health held abroad as recently as 1953 and thereafter reported on such proceedings to his professional societies (R. 109).

In April 1955 Dr. Briehl applied for the renewal of a passport which had been issued to him two years earlier (R. 109). He stated in his application for renewal that he needed a passport in order to attend an international psychoanalytic conference in Geneva and a World Mental Health Organization Congress in Istanbul (R. 101). Miss Frances G. Knight, the Director of the Passport Office replied with the following request:

> " . . . it would be helpful to the Department if you would furnish an affidavit setting forth whether you are now or ever have been a Communist, and explain your connections with the Book Shop Association, St. Louis, Missouri; the Civil Rights Congress; the Hollywood Arts, Sciences and Professions Council; and the Los Angeles Committee for the Protection of the Foreign Born. Your affidavit

should set forth your connection with any other Communist front organizations with which you may have been associated" (R. 117-118).

Dr. Briehl's counsel advised Miss Knight that the affidavits requested would not be filed on the ground that the Department had no power, under the Constitution, to require him to furnish such information (R. 118).

Thereafter Miss Knight advised Dr. Briehl that the Department "is obliged to disapprove your request tentatively" under 22 C. F. R. § 51.135 for the following reasons:

> "In your case it has been alleged that you were a Communist. Specifically it is alleged that you were a member of the Los Angeles County Communist Party; that you were a member of the Bookshop Association, St. Louis, Missouri; that you held Communist Party meetings; that in 1936 and 1941 you contributed articles to the Communist Publication 'Social Work Today'; that in 1939, 1940 and 1941 you were a sponsor to raise funds for veterans of the Abraham Lincoln Brigade in calling on the President of the United States by a petition to defend the rights of the Communist Party and its members; that you contributed to the Civil Rights Congress bail fund to be used in raising bail on behalf of convicted Communist leaders in New York City; that you were a member of the Hollywood Arts, Sciences and Professions Council and a contact of the Los Angeles Committee for Protection of Foreign Born and a contact of the Freedom Stage, Incorporated" (R. 120, 121).

The same letter offered Dr. Briehl an informal hearing at which "you may present your case and all relevant information informally to the Passport Office" and "you will be required to submit a sworn statement as to whether you are now or ever have been a Communist" (R. 121).

There was further correspondence, in the course of which Dr. Briehl's counsel requested an evidentiary hearing (R. 122) in accordance with the decision in *Nathan* v.

Dulles, 129 F. Supp. 951; see also *Dulles* v. *Nathan*, 225 F. 2d 29 (R. 123).

An "informal hearing" was eventually held on August 30, 1955 (R. 114, 127-156). The passport officials offered no evidence in support of the allegations made in Miss Knight's letters. They did not dispute Dr. Briehl's citizenship or the sworn statement of the purpose of his trip as set forth in his passport application. They rejected his request that evidence against him, if such there were, be presented at that time.

The Passport Office was interested solely in examining Dr. Briehl as to his political associations. He declined to submit to such examination, asserting that the questions were not relevant to his application for a passport and impinged upon his constitutional rights, and asserting further that it was the burden of the State Department to present evidence against him before he could be required to offer evidence in reply (R. 127-150). Thereupon the Passport Office refused to take any further action upon his application for a passport (R. 159-160), and the Board of Passport Appeals refused to entertain an appeal, on the ground that there was no "adverse decision" in Dr. Briehl's case (R. 162).

(2) Mr. Rockwell Kent

Mr. Rockwell Kent is an American citizen by birth, internationally famous as an artist, writer and explorer.[1] His etchings and paintings are exhibited in numerous libraries and museums throughout the world. His murals appear in government buildings, his illustrations of the books of Chaucer, Shakespeare and Melville are known to millions of readers in this country. He has served on numerous commissions and juries in the field of art.

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[1] Columbia Encyclopedia (1950), p. 963.

For many years Mr. Kent had used passports for travel abroad. Much of his best work as an artist and a writer was done upon the basis of travel to such out of the way places as Greenland and Tierra del Fuego.[2] For the last seven years, however, Mr. Kent has been prevented from traveling abroad by reason of the Secretary's refusal to give him a passport (R. 8-9). On June 1, 1955 he applied for a passport in order to attend a meeting in Finland on June 22d (R. 28). The Department sent a letter of tentative denial on June 29th, stating:

> "* * * in your case it has been alleged that you were a Communist.
>
> The Department has concluded that your case also falls within the scope of sub-sections (b) and (c) of Section 51.135 of the Regulations. It is the opinion of the Department that the evidence indicates on your part a consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line for an extended period of time" (R. 23).

The Director's letter of tentative denial charged that Mr. Kent had been "affiliated" with numerous "Communist front organizations" and that he had an "interest in and espousal of the Communist cause" (R. 23). This was supported by particular reference to articles written by him for groups which were on the Attorney General's list or had been cited by the House Committee on Un-American Activities, and to speeches by him before such groups (R. 22-28, 79-82). The Department did not suggest that any of these associations or activities constituted a violation of law.

The following is a fair sampling of the charges:

> "Your interest in Communism and your sympathetic support for the Soviet have been expressed in your prolific writings published both in the Communist and non-Communist Press" (R. 23).

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[2] See Kent, IT'S ME O LORD (1955).

> "You were a speaker at a dinner in 1954 in honor of Eslanda and Paul Robeson" (R. 24).
>
> "You allegedly made a speech in 1952 in which you urged that Communists in the United States must be defended" (R. 25).
>
> "You are a sponsor of a four page petition addressed to Attorney General Herbert M. Brownell criticizing the use of paid informers" (R. 24-25).
>
> "signer of a petition sponsored by the Peace Information Center urging ban on use of atomic bomb" (R. 27).
>
> "It has * * * been alleged that you sought the repeal of the Walter-McCarran Law" (R. 25).
>
> "[you] urged clemency for Rosenbergs" (R. 25).
>
> "[you] urged release on bail of Steve Nelson who was convicted of sedition in Pennsylvania" (R. 25).

Mr. Kent's reading matter and personal friends were also deemed relevant to the Department's action upon his application:

> "You are alleged to have been a long time subscriber to the 'Daily Worker', 'The Worker', and the 'U.S.S.R. Information Bulletin'; and you repeatedly include nationally known Communists among your friends and house guests" (R. 24).

Miss Knight's letter advised Mr. Kent that he could have an informal hearing. "In such case you will be required to submit a sworn statement as to whether you are now or ever have been a Communist." (R. 27) Subsequently the Department also requested "a complete explanation of your alleged Communist activities as set forth in a previous letter from the Department to you" (R. 31). The matter was not further pursued by Mr. Kent since the Department's delay had precluded the trip (R. 28).

On August 2, 1955 Mr. Kent again applied for a passport. He stated under oath that the sole purpose of his

proposed travel was "prosecution of profession and pleasure" (R. 39). This application was denied "tentatively", reference being made to the prior letter of denial referred to above (R. 37).

On November 8, 1955 an "informal hearing" was held (R. 34-64). The Department produced no witnesses. It offered in evidence Mr. Kent's recent autobiography, *"It's Me O Lord"* for the purpose of showing that he had joined many organizations on the Attorney General's list (R. 45) and to demonstrate other of Mr. Kent's activities of a similar nature (R. 46-51, 57). The Department also offered the transcript of a hearing before a Congressional Committee for the purpose of showing that Mr. Kent had asserted his constitutional privilege under the Fifth Amendment before that Committee (R. 56).

Mr. Kent was asked and declined to submit a statement under oath "as to membership in the Communist Party or membership in the Communist front organizations" (R. 59). When asked to submit evidence of conduct "antagonistic to the Communist Party, that showed that he did something not along the line" (R. 62), Mr. Kent responded:

> "I think that I could very easily think of a number of things that I have done and principles I have advocated that they wouldn't like one single bit. I would have to think about them. Because I have not been concerned • • • whether • • • what I believe in is believed by others, by the Communists or what. But, I'm not going to say that because, as I said before, I consider this irrelevant" (R. 62).

The hearing was concluded with a statement by the representative of the Passport Office as follows: "I think it's only fair to apprise Mr. Kent of the fact that we have additional information in our files which we are precluded by the Security Regulations from divulging at this hearing" (R. 64).

The Director of the Passport Office declined to give him a passport on the basis of the allegations against him, stating:

> "At the informal hearing, at which you were represented by counsel, you declined to furnish a statement, subscribed and sworn to under oath or affirmation with respect to your present or past membership in the Communist Party, insisting that such a statement was irrelevant. Moreover, you refused to discuss or furnish any information concerning your alleged affiliation with Communist-front organizations or other alleged Communist activities on the same ground. These allegations, which you have neither refuted nor explained, were detailed in my letter to you of June 29, 1955" (R. 73).

Mr. Kent, through his counsel, requested the Board of Passport Appeals to entertain an appeal from this action but received no reply (R. 74-5, 16).

B. The District Court Actions

Having no further recourse in the Department, petitioners instituted separate law suits in the District Court for the District of Columbia seeking decrees adjudging their right to passports and directing their issuance (R. 2, 100).

The Secretary's answers did not deny the essential facts set forth in the complaints (R. 4, 104). Petitioners moved for summary judgment and for preliminary injunctions prohibiting the Secretary from denying them passports, supporting these motions with the correspondence and the proceedings before the Passport Office, as described above (R. 7, 107-108). The Secretary moved for judgment on the pleadings or in the alternative for summary judgment (R. 76, 163).

In each case, the Secretary attached to his motion an affidavit by Miss Frances G. Knight, Director of the Passport Office. This affidavit did not dispute any of the factual

statements made by petitioners. In each case the affidavit recited the reason why the Director believed it necessary and still "deem[s] it necessary, to require the plaintiff to execute, as a part of his application, an oath or affirmation as to present and past membership in the Communist Party" (R. 79, 165).

In Mr. Kent's case the reasons were said to be "information set forth in (a) government publications, news reports, and other public sources; (b) records of the Department of State and confidential reports from its officers in foreign countries, and (c) confidential reports from another agency of the Government" (R. 79). The affidavit recited alleged activities and affiliations of Mr. Kent for the past 20 years. These were similar to those set out in the letter of tentative denial and described above. (R. 79, 84).

As to Dr. Briehl, the Director purported to rely on "reports of a confidential character furnished the Department by another agency of the Government" (R. 165). The affidavit then went on to recite allegations substantially identical to those set out in the letter of tentative denial which is referred to *supra*, p. 5 (R. 165-166). Here the latest incident was alleged to have occurred in 1951 (R. 165).

In neither case did any of the allegations charge or even suggest any illegal conduct. On the contrary, all of the alleged activities were protected by the First Amendment.[3]

The District Court denied the petitioners' motions and granted those of the Secretary upon the ground that the petitioners had failed to exhaust their administrative remedies and had failed to qualify for a passport—the reason

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[3] The sole exception was the reference to Mr. Kent's reliance on his privilege under the Fifth Amendment when summoned as a witness before the McCarthy Committee (R. 82).

in each case being the refusal to execute "the non-Communist affidavit which the valid regulations require" (R. 84, 169-172).

C. The Proceedings in the Court Below

The Court of Appeals heard the cases *en banc*. Four separate opinions resulted. By a vote of 5 to 3, it held that "the disputed regulations of the Secretary are valid and that Dr. Briehl did not qualify himself for a passport under them" (R. 198). A similar decision was made in Mr. Kent's case (R. 89). Accordingly, the judgments of the District Court were affirmed (R. 91, 247).

Summary of Argument

I.

The denial of a passport is a denial of the right to travel. It is unlawful to travel to European countries without a passport. Even where lawful, it is, as a practical matter, a requisite for admission to most countries. Accordingly, a denial of a passport must be justified as a denial of the right to travel.

This right is protected by the Constitution. It is an attribute of personal liberty. In many instances, as in the case of petitioners here, it is important to the pursuit of a livelihood and the furtherance of a career. The educational value of travel and the opportunities it affords for the exchange of ideas and experiences justifies its characterization as an exercise of First Amendment rights. It is important also for the creation of an informed citizenry which, on the basis of its own independent observation of countries abroad, can critically participate in the formation of our government's foreign policy. Finally, the action of the Government in preventing the citizen from leaving the country is *pro tanto* to imprison him.

II

The 1952 regulations under which the Secretary of State denied passports here were the first regulations in American history to establish political, or any substantive, qualifications for a passport other than citizenship. The Secretary, however, lacked the authority to issue these regulations.

The regulations purport to find their source of authority in the provisions of 22 U. S. C. § 211a enacted in 1926. This statute however was merely a reenactment with minor revisions of the first passport Act enacted in 1856. Its limited purpose was to centralize the issuance of passports in the Department of State. The statutes were enacted in a period when passports were not a mechanism for the control of travel and hence Congress could not have intended by this legislation to control travel in any respect. The legislative history of the statutes demonstrates that the sole discretion vested in the executive under these statutes was to issue regulations of an administrative and routine nature; and not to establish classes of eligibility for passports. This has been the construction given the statute for almost a century prior to the 1952 regulations and deference must be accorded to this administrative construction.

Moreover, the construction given to the 1926 statute by the Court below would render it unconstitutional. If viewed as a grant of power to the Executive to control travel, the absence of any standards as a guide to the exercise of that power, would constitute an invalid delegation of power.

Nor can any authority for the regulations be found in the provisions of 8 U. S. C. § 1185(b). This statute makes it unlawful during a national emergency, proclaimed by the President, for a citizen to leave the country without a

passport. But this statute contains no standards whatever for determining to whom passports should be denied and it does not grant authority to the Executive to make such determination. There is no basis either in the language of the statute or in its legislative history to support the assumption of the court below that Congress by this statute was legislating travel control in the field of Communism. Thus, to construe this statute as a grant of power to the Executive to control travel would encounter, because of the absence of standards, the same constitutional objections as in the case of the 1926 statute.

The construction given to these statutes by the Court below is contrary to Congressional intent as manifested in other legislation. Congress did establish in § 6 of the Internal Security Act of 1950 a class of citizens who were ineligible to receive passports. That classification is in sharp variance from the classifications set out in the Secretary's regulations. The court below found justification for the Secretary's regulations in the Congressional findings of the Internal Security Act. However, it must be presumed that the Congressional judgment as to the remedy to be provided on the basis of such finding was adequate and that Congress did not intend to deny passports to citizens in categories other than those covered by § 6. The State Department has indicated its awareness that the regulations go far beyond the 1950 statute and has sought to justify the regulations on the ground that they were within the "spirit" of the statute. But the Secretary was not authorized by an assumed spirit of the legislation to implement his notion of Congressional desires by issuing regulations of a legislative character going far beyond the statute enacted by Congress.

Secondly, the regulations conflict with Congressional policy as set forth in the Expatriation Act of 1868 favoring freedom of expatriation. Expatriation is not possible without freedom to depart from one's country.

III

The regulations establishing classes of citizens who may not leave the country are an exercise of law-making authority beyond the power of the executive branch. Under our constitutional system the Executive has no power to make law in any field, whether it be that of foreign relations or otherwise.

Secondly, the denial of the right to travel is not the conduct of foreign affairs. It involves the relationship of the government to its own citizens and constitutes a restriction upon their liberty. Such a power cannot be considered to be an inherent power of the Executive.

IV

a. The regulations as written and applied violate the First Amendment because the interference with petitioners' right to travel is explicitly based upon their past political associations, writings, speeches and beliefs which were entirely lawful and therefore were protected by the First Amendment. The regulations as applied also impose a prior restraint upon the future exercise of those rights, preventing the petitioners from traveling abroad for professional reasons; in the one case to consult with colleagues in the field of medicine and in the other to paint pictures.

These restrictions upon the petitioners affect the rest of our citizens who may find it necessary to adjust themselves in their beliefs, speech and associations in order to be able to travel.

If there are any circumstances under which this fundamental liberty of movement may be curtailed they could only be such as present a substantial threat to the security of the state. No such threat exists in the exercise of

the right of travel generally or by petitioners whose legitimate reasons for travel are not contested by the government.

The government's alternative suggestion that a passport is a kind of diplomatic document guaranteeing protection is neither a correct construction of the passport nor a justification for its denial. The explanation of the Court below, namely that "adherents" of the Communist movement may communicate with others abroad or that they may provoke the Soviet Union into hostile action is purely speculative, unsupported by petitioners' past exercise of First Amendment rights in this country and is not a justification for so drastic a limitation upon movement.

b. The Department is completely indifferent to the actual purposes of the proposed trips. It asserts, in effect, that persons who have expressed themselves on political, social and economic issues differently from those of the government are inherently unfit for travel because of an unproven potentiality for undisclosed danger. This argument is so irrational, particularly where First Amendment rights are involved, that it denies substantive due process.

c. The Department was not legally justified in rejecting petitioners' passport applications on the ground that they refused to execute affidavits as to membership in the Communist Party and related matters. This requirement was imposed by the Secretary, not by Congress, as a device to shift the burden of proof from the Secretary, where it belongs, to the citizen. It constitutes a test oath of the kind previously held invalid by this Court. Such oaths have been upheld only where imposed by statute and under circumstances radically different from the present one, *viz.* in connection with state elections, state employment and the use of the facilities of the National Labor Relations Board. None of these cases involved as fundamental a liberty as freedom of movement.

d. The regulations predicate ineligibility for travel upon past conduct antedating even the date the regulations were promulgated. This is penal action retrospective in character and violative of Article 1, § 9 of the Constitution. The regulations also proscribe the issuance of passports to persons who "are members of the Communist Party" § 51.135(a). The disqualification of a group named by the government is the traditional form of a bill of attainder.

e. The regulations deny due process in fundamental respects. They employ such vague criteria as the "interests" of the Communist Party and "consistent and prolonged adherence to the Communist Party line" § 51.141. Such vague terms are particularly pernicious where they are based upon and adversely affect the exercise of First Amendment rights.

f. The vagueness of the Department's regulations are equalled only by the unfairness of its procedures. The Secretary makes "allegations" based upon reports of persons usually unknown to the State Department even by name. The hearings consist of an examination of the applicant under oath as to his political beliefs and associations; no witnesses are produced against him. The Secretary's decision is based upon alleged evidence concealed from the applicant. Such procedures violate due process and this Court's decisions that administrative action predicated upon undisclosed facts is invalid.

ARGUMENT

I.

Petitioners have a constitutional right to travel and hence to a passport.

A. The Denial of a Passport is a Denial of the Right to Travel

Whatever the role of a passport in earlier days, it is now a prerequisite to travel in most parts of the world. As stated by the court below in *Shachtman* v. *Dulles*, 225 F. 2d 938, 941: "Earlier in our history * * * it [a passport] was * * * a desirable incident to travel, not a necessity * * *. Now it is unlawful for a citizen to travel to Europe and impossible to enter European countries without a passport." See 8 U. S. C. § 1185(b) and Proclamation No. 3004, 18 F. R. 489 (1953). Even in the Western Hemisphere, a passport is a requisite for admission to most countries.[4] Under such circumstances, a denial of a passport must be justified as a denial of the right to travel, a right which, as we shall show, is protected by constitutional guarantees.

B. The Right to Travel is Protected by the Constitution

Freedom of movement is an attribute of personal liberty, serving important purposes in a democratic society. In *Shachtman* v. *Dulles, supra*, at 941, the court below affirmed the right to travel as a basic element of the liberty protected by the Fifth Amendment:

> "The right to travel, to go from place to place as the means of transportation permit, is a natural right subject to the rights of others and to reasonable regulation under law. A restraint imposed by the Government of the United States upon this liberty, therefore, must conform with the provision of the

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[4] *Travel Abroad—Frontier Formalities* (a joint publication by UNESCO and International Union of Official Travel Organizations).

> Fifth Amendment that 'no person shall be • • • deprived of • • • liberty • • • without due process of law.' ''

Such great jurists as the former Chief Justice Centlivres of South Africa, Sir Alfred Denning and Professor Hans Kelsen agree upon the inclusion of "freedom of movement within and outside the limits of their own country among the fundamental rights of man."[5]

The right to travel is deeply rooted in Anglo-Saxon law. Demands for freedom of travel abroad were acknowledged in England as far back as Magna Carta. McKechnie, *Magna Carta* (1914) 398-407. The right became established in the common law by the early seventeenth century. Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 Georgetown L. J., 63, 70 (1952); Parker, *The Right to Go Abroad: To Have and to Hold a Passport*, 40 Virginia L. R., 853, 868 (1954).

The right to travel was by definition an essential element of life in colonies created by emigants. Chafee, *Three Human Rights in the Constitution* (1956) 162-213. Freedom of movement finds expression in Colonial charters, in the Massachusetts Body of Liberties, in the Constitution of the State of Pennsylvania and in the Articles of Confederation (*ibid*).[6]

The Constitution has no express provision on the freedom of travel, either within the United States or abroad. However, in light of the history of the common law there is no doubt that the freedom of citizens to come and

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[5] A. P. Van de S. Centlivres, *The Constitution of the Union of South Africa and the Rule of Law* (*Government under Law*) (1956) p. 423; See also Sir Alfred Denning, *Freedom Under Law* (*The Hamlyn Lectures*) (1949); 5 *Sammlung der Erkenntnisse des Verfassungsgerichtshofes* 137 (Dec. 14, 1925) (Kelsen, J.).

[6] Jefferson referred to "a right, which nature has given to all men, of departing from the country in which chance, not choice has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as to them shall seem most likely to promote public happiness." Jefferson, *Papers*, I, 217, quoted in Rossiter, *Seedtime of the Republic* (1953) 378.

go was among the liberties embodied in the Constitution. Note, 41 Georgetown L. J., *supra*, at 71-72. And in *Williams* v. *Fears*, 179 U. S. 270, 274, this Court in discussing interstate movement said:

> "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty * * *."

See also *Crandall* v. *Nevada*, 73 U. S. 35; *Edwards* v. *California*, 314 U. S. 160 and *Hague* v. *C.I.O.*, 307 U. S. 496.

In *Bauer* v. *Acheson*, 106 F. Supp. 445, 451, a three judge court, referring to *Williams* v. *Fears*, *supra*, said:

> "* * * It is difficult to see where, in principle, freedom to travel outside the United States is any less an attribute of personal liberty * * *. Personal liberty to go abroad is particularly important to an individual whose livelihood is dependent upon the right to travel * * *."

This view is accepted by the court below in the instant and other recent passport cases (R. 192). See *Shachtman* v. *Dulles*, *supra*; *Boudin* v. *Dulles*, 235 F. 2d 532, aff'g and modif. 138 F. Supp. 218.

The right to travel is a fundamental aspect of liberty. It is appropriately included in the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948,[7] and in various treaties of friend-

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[7] United Nations Department of Public Information, Universal Declaration of Human Rights (1949), S. Doc. 123, 81 Cong. 1st Sess., 1156. Article 13 provides:

> "(1) Everyone has the right to freedom of movement and residence within the borders of each state. (2) Everyone has the right to leave any country, including his own, and return to his country."

Freedom of movement is necessary to the exercise of other basic rights protected by the Declaration—those of expatriation (*infra*, p. 36), emigration and asylum. On emigration see Lauterpacht, *International Law and Human Rights* (1950); Lauterpacht, *An International Bill of Rights of Man* (1945); Stoessinger, *The Refugee and the World Community* (1956). On asylum, see Weis, *Nationality and Statelessness in International Law* (1956) *passim*.

ship, commerce and navigation to which the United States is a party.[8]

Its essentiality to a democratic society is clear from the fact that "freedom of mobility and political power in the hands of the people have generally appeared at the same time * * * one of the first acts of any dictatorship or police state is to repress the free movement of the population." Vestal, *Freedom of Movement*, 41 Iowa Law Review, 6, 13.[9] Cf. Comment, *Passport Refusals for Political Reasons, Constitutional Issues and Judicial Review*, 61 Yale L. J. 171, 202 (1952).

The right to work and the freedom to move about are intimately connected. In *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, this Court said that the term "liberty" in the Fourteenth Amendment includes "* * * the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; [and] to earn his livelihood by any lawful calling * * *."[10]

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[8] See, for example, Treaty between the United States and the Italian Republic, Feb. 2, 1948, Art. 1, § 1, 2 U. S. Code Cong. Svc. (1948) 2814; and see Vestal, *Freedom of Movement*, 41 Iowa L. J., 25, n. 61. Recently adopted constitutions also provide for free mobility. *Ibid.*, p. 13, n. 26.

[9] Italy: Royal Decree of November 6, 1926, No. 1848; Soviet Union: Decree of October 20, 1921, discussed in 1 Fauchille, *Traite de Droit Internationale Public* (8th ed. 1922) 905; Nazi Germany: See 2 *Scelle Precis du Droit des Gens* (1934) 77; Cuba: Legislative Decree No. 1463 (Gaceta Official of June 11, 1954), United Nations Yearbook on Human Rights for 1954 (1957) 66; Union of South Africa: Departure from the Union Regulation Act (1955), Government Gazette No. 5509. See also Reale, *Passport*, 12 Encycl. Soc. Sc. (1934), 13-16.

[10] It is significant that when restrictions on the right of exit from England were imposed after its initial broad grant in Magna Carta, merchants, whose vocation depended upon their mobility, were as a rule excepted. Note, 41 Georgetown L. J., *op. cit. supra*, at 66-69 (1952). The concept was summed up by Msgr. Edward Swanstrom, in an address to the National Catholic Welfare Conference, when he said:

> "The inherent right of man to move to parts of the earth where his productive capacities can be put to use stems from the Christian view of property and of the world as a whole",

quoted in Vestal, *op. cit. supra*, 41 Iowa L. R. at 11, n. 17.

Obviously, the artistic and scientific work of the respective petitioners is interfered with by the restrictions imposed on the places where they can perform it, their earning powers may well be curtailed and their professional standing impaired.

The educational value of travel is as real today as it was for those who, in an earlier day, took the Grand Tour.[11] The close relationship between intellectual progress and freedom of movement is virtually an axiom in the scientific field today. Hence, the vigorous criticism by educational, scientific and government leaders of our restrictive passport and visa policies.[12]

Judge Wyzanski has brilliantly assimilated travel to the exchange of ideas and experiences protected by the First Amendment:

> "This travel does not differ from any other exercise of the manifold freedoms of expression—from the right to speak, to write, to use the mails, to publish, to assemble, to petition. In all these liberties the principal element is the stretching of the mind to accommodate the growing spirit." Wyzanski, *Freedom to Travel*, Atlantic Monthly, Oct. 1952, 66, 68.

It is essential, in a democracy, that citizens acquaint themselves at first hand with the effects abroad of our

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[11] See *e.g.* C. P. Brand, *Italy and the English Romantics* (1957); Malone, *Jefferson and the Rights of Man* (1951) 112-150; Karamazin, *Letters of a Russian Traveler (1789-1790)* (1957).

[12] See *e.g.* the testimony of Dr. Warren Weaver, Vice-President of the Rockefeller Foundation, before a House Government Operations Subcommittee on Government Information (N. Y. Times, Jan. 23, 1958, pp. 1, 9); also the testimony of Geoffrey F. Chew, Chairman, Passport Committee, Federation of American Scientists, (Senate Committee on the Judiciary, Subcommittee on Constitutional Rights, Hearings, Nov. 15-16, 1955, 84th Congress, 1st Sess., herein called the "*Hennings* Hearings", pp. 86-103; Berkner, *Earth Satellites and Foreign Policy*, Foreign Affairs, Jan. 1958, 221 at 226, 229-30; Shils, *The Torment of Secrecy*. (1956); Grundfest, *Science and the Department of State*, Science, Oct. 12, 1956, p. 687.

government's policies, foreign and domestic, and with conditions abroad which might affect such policies. *Chafee, supra* at p. 196; Comment, 61 Yale L. J. *supra* at 191.[13]

Moreover, travel is an aid to the free interchange of ideas among nations; to the increased knowledge of foreign countries and the better understanding of one's own country. One of our national objectives is "to lower the barriers which now impede the opportunities of people to travel anywhere in the world for peaceful, friendly purposes, so that all will have a chance to know each other face-to-face."[14]

Finally, to prevent a citizen from leaving the country is *pro tanto* to confine him within the limits of the United States, and is accordingly a restriction on his liberty. *Cf. Walker* v. *Chief Quarantine Officer*, 69 F. Supp. 980. According to Blackstone, one of the attributes of personal liberty at common law was the "power of locomotion, of changing situation, or moving one's person to whatever place one's inclination may direct", 1 *Commentaries* 134. And it has been observed that "the distinction between restriction to a jail, to a city, to a state, or a nation is merely one of degree." Comment, 61 Yale L. J. *supra* at 190.

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[13] See, for example, the remark of Senator Allen J. Ellender that impressions he gained first hand on a trip abroad "differ sharply" from those he received from the State Department. New York Times, Sept. 6, 1955, p. 4, col. 3.

[14] President Eisenhower, quoted in *The Geneva Conference of Heads of Government* (1955), 63. And President Truman wrote to Nikolai M. Schvernik, President of the Soviet Presidium, that "peoples who are denied the normal means of communication will not be able to attain that mutual understanding which must form the basis for trust and friendship. We shall never be able to remove suspicion and fear as potential causes of war until communication is permitted to flow, free and open, across international boundaries." N. Y. Times, July 8, 1951, p. 5, col. 1. This policy is expressly set forth in the United States Information and Educational Exchange Act, Public Law 402, 80th Congress, 2d Sess. (1948). See also Colligan, J., *Americans Abroad*, State Dep't Bulletin, May 3, 1954, Vol. 30, No. 775; Agreement Between the United States of America and the Union of Soviet Socialist Republics on Exchanges in the Cultural, Technical and Educational Fields, N. Y. Times, Jan. 28, 1958, p. 8.

All of the above considerations apply in the cases of the petitioners. Each desires to go abroad in order to further his livelihood and his career. Each has shown a creditable concern with public issues, and their travel abroad would enhance their ability to fulfill their responsibilities as citizens.[15]

II.

The Secretary of State lacked the authority to issue the regulations of August 28, 1952 under which petitioners were refused passports.

A. Genesis of the Regulations

Although passports have been issued throughout our history, it was not until the last decade that the Secretary of State asserted authority to restrict the right to travel abroad because of a citizen's political views or associations. This claimed authority, first exercised after the close of World War II, was originally applied without any formal regulations, and denials were based upon the formula that the issuance of a passport was "contrary to the best interests of the United States." See Note, *"Passport Denied": State Department Practice and Due Process*, 3 Stanford Law Review 312 (1951); Comment 61 Yale L. J. *supra* (1952).

In *Bauer* v. *Acheson*, 106 F. Supp. 445, a three judge court invalidated the Secretary's procedures. Thereupon he promulgated the regulations of August 28, 1952 (Appendix, [illegible]), the purported basis for the action taken here. These regulations for the first time in American history establish political standards for travel abroad. More significantly, they are the first regulations in American history to establish any substantive qualifications for a passport other than citizenship.

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[15] See Chafee, *op. cit. supra*, 196.

We will show that the Secretary was not authorized to issue these regulations by statute or otherwise, and that if he were, the regulations would be unconstitutional on their face and as applied.

B. The Claimed Statutory Authority

(1) 22 U. S. C. § 211a

The regulations purport to find their source of authority in "paragraph 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F. R. 681; 22 CFR § 51.77), under authority of section 1 of the Act of Congress approved July 3, 1926 (44 Stat 887; 22 U. S. C. § 211a)." (17 F. R. 8013; Appendix, 66.) The statute in question states in pertinent part:

> "The Secretary of State may grant and issue passports • • • under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue or verify such passports."

Pursuant to this statute the President on March 31, 1938 promulgated Executive Order No. 7856, 3 F. R. 681, 22 CFR § 51.1 *et seq.*, which, together with the 1926 statute, remains to this date the Secretary's basic mandate and source of authority. The Executive Order repeats certain statutory provisions and in addition sets forth various regulations, prescribing the contents of applications, fixing fee requirements and exemptions therefrom, and similar matters. It also authorizes the Secretary to issue, revoke and deny passports and to make regulations "additional to the rules in this part and not inconsistent therewith", 22 CFR § 51.77.

The 1926 statute, which forms the claimed authority for the Secretary's regulations, was not new law. It was only a reenactment, with minor revisions, of the first pass-

port legislation, enacted a century ago, Act of August 18, 1856, 11 Stat. 60, and amended in 1902, 32 Stat. 386.[16]

The purpose of the 1856 Act was merely to prohibit the issuance of passports by anyone other than the Secretary of State. For the absence of any legislation on the subject had "led to gross abuses" and the issuance by local officials of passports which in many cases were fraudulent and consequently embarrassing to the United States. See 9 Op. A. G. 350 (1859). The purpose of Congress was merely to centralize and control the procedure of passport issuance. See Note, *The Passport Puzzle*, 23 U. Chi. L. Rev. 269 at 272, n. 25 (1956); Doman, *A Comparative Analysis: Do Citizens Have the Right to Travel*, 43 A. B. A. J. 307, 308 (1957), Barnett, *Passport Administration and the Courts*, 22 Oregon Law Review, 193, 194 (1953).

The 1926 statute neither grants nor was intended to grant any additional authority to the Executive. Assistant Secretary of State Carr, testifying before the House Committee on Foreign Affairs with respect to the nature of the rules contemplated by the 1926 statute, stated that

> "these rules are administrative rules * * */[governing] * * * the different things that must be provided for that will come up from time to time under different conditions, different modes of travel and various things that arise in the course of a period of time * * * the object [of the Secretary's rule-making power] being to provide for administrative rules to be issued by the Secretary of State so as to avoid troubling the President with many details."[17]

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[16] The 1902 amendment authorized the issuance of passports to persons "owing allegiance, whether citizens or not," 32 Stat. 386. The purpose of the amendment was to authorize passports to citizens of Puerto Rico, Hawaii and the Philippines, whose allegiance the United States acquired when it extended its sovereignty to those areas. 35 Cong. Rec. 5697, 6588, 57th Cong., 1st Sess. (1902). And see 26 Op. A. G. 376 (1907).

[17] Hearings before the House Committee on Foreign Affairs on H. R. 11947, 69th Cong., 1st Sess. (1926), pp. 5-6.

And the stated reason for the delegation of rule making power to the President was so that Congress "would not be bothered with all these small administrative changes." *Id.*

The regulations issued pursuant to the 1856 and 1926 statutes were of that routine administrative nature. These regulations, whether presidential or departmental, prescribed the identifying information required on an application, the size of passport photographs, the contents of the affidavit of a supporting witness as to the citizenship of an applicant, etc.—all clearly matters of administrative routine.[18] The first regulations of a substantive character issued by the Secretary of State were the regulations of 1952, here in issue.

Thus, for almost one hundred years the Executive construed the passport statutes as authorizing only the power to issue regulations of an administrative character. It was not until 1952 that the statute was invoked as a source of authority to define classes of citizens ineligible for passports. In determining the meaning of the 1856 and 1926 statutes, deference must be accorded to this century of administrative construction. *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322; *National Lead Co.* v. *United States*, 252 U. S. 140; *Five Per Cent Cases*, 110 U. S. 471. The failure of the Secretary to assert any power to make substantive regulations for so long a period is a persuasive indication that no such power was ever granted. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349.

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[18] See Department of State, *The American Passport*, Chapter IV (1898); Executive Order No. 654, June 13, 1907; Executive Order No. 4359-A, Dec. 19, 1925; Executive Order No. 4392-A, Feb. 12, 1926. Executive Order No. 4488, August 3, 1926; Executive Order No. 5960, June 22, 1932; Executive Order No. 6650, March 23, 1934; Executive Order No. 7856, March 31, 1938; Departmental Order No. 749, March 31, 1938; Departmental Order No. 366, Feb. 12, 1926 (recited in Hearings before the House Committee on Foreign Affairs on H. R. 11947, 69th Cong., 1st Sess. (1926), pp. 25-28; Departmental Order No. 749, March 31, 1938, 22 C.F.R. 51.101-51.134 (Passport Regulations, Department of State Publication 1165 [1938] pp. 20-25).

The position of the majority below that the 1856 and 1926 statutes may be interpreted in the light of a general anti-communist policy as shown by congressional, executive and judicial pronouncements dating from 1950 on, is an absurd anachronism. Such reliance upon a general governmental policy, the inception of which postdates the statute, and without reference to the specific language or legislative history of the statutes themselves, rests on an untenable basis. *Hadden* v. *Barney*, 5 Wall. 107. This is particularly true since passports were not required as a condition to lawful departure in peacetime either in 1856 or 1926 and were therefore merely a convenience for the traveler.[19] Accordingly, Congress could not have intended by this legislation to control travel in any respect.

The construction given to the 1926 statute by the Court below would only serve to render it unconstitutional. For if interpreted as a grant of power to the Executive to control travel, the statute must fall because of its failure to supply any standards for the exercise of that power.

The classical statement on the power of Congress to delegate authority to co-ordinate branches of the government was made by Chief Justice Marshall in *Wayman* v. *Southard*, 10 Wheat. 1, 43. "* * * [I]mportant subjects [he held] must be entirely regulated by the legislature itself [while as to matters] of less interest * * * a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

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[19] Thus *e.g.* the *"General Instructions in Regard to Passports"* of 1873 referred to passports as follows: "Citizens of the United States visiting foreign countries are liable to serious inconvenience if unprovided with authentic proof of their national character. The best safeguard is a passport from the Department certifying the bearer to be a citizen of the United States upon application supported by proof of citizenship." Dept. of State, *The American Passport, supra*, p. 54.

But "before another agency can 'fill up the details', Congress must enact something to be thus supplemented. In the current idiom, the law makers must first adopt a policy or set up an 'intelligible standard' to which administrative action must conform." *The Constitution of the United States of America* (ed. Corwin, 1953), Sen. Doc. 170, 82nd Cong., 2d Sess., p. 75, citing *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 398, and *United States* v. *Rock Royal Cooperative*, 307 U. S. 533, 576. Thus, if viewed as a grant of power, the absence of standards would render the statute unconstitutional as an invalid delegation of law-making power, since Congress cannot delegate to the Executive power to make judgments and issue regulations which are legislative in character. *Miller* v. *United States*, 294 U. S. 435. And since the right to travel is "an attribute of personal liberty," *Williams* v. *Fears*, *supra*, at 274, such standards, totally lacking here, would have to be especially precise. *Saia* v. *New York*, 334 U. S. 558, 560; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C.I.O.*, 307 U. S. 496; *Niemotko* v. *Maryland*, 340 U. S. 268, 271; *Burstyn* v. *Wilson*, 343 U. S. 495.

The uncontrolled discretion which the view of the Court below would vest in the Secretary would render the statute clearly unconstitutional. "It is settled by a long line of recent decisions of this Court that [a statute] which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Staub* v. *City of Baxley*, No. 48, Oct. Term, 1957, 78 S. Ct. 277, 282.

Statutes must be narrowly construed to avoid, rather than to create, constitutional problems, particularly where

the suggested construction will, as here, concededly infringe upon fundamental rights. *United States* v. *Rumely*, 345 U. S. 41, 46; *United States* v. *Witkovich*, 353 U. S. 194.

For all of these reasons the 1856 and 1926 statutes must be construed as authorizing the Secretary to issue regulations only of an administrative character. Accordingly, the statute on which the regulations expressly rely does not authorize them.

(2) 8 U. S. C. § 1185(b)

In an effort to avoid the dilemma of the 1926 statute, the court below and the government placed reliance for the Secretary's power to issue the regulations upon the provisions of 8 U. S. C. § 1185(b). This statute provides that during the existence of any national emergency proclaimed by the President "it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." The difficulties of justifying the passport regulations under this statute are even greater than under the 1926 statute.

In the first place, the regulations themselves do not claim authority from this statute but rest exclusively on the authority claimed to be conferred by 22 U. S. C. § 211a. The reasons for this are plain. The regulations were issued on August 28 of 1952. 17 F. R. 8013, 22 C. F. R. §§ 51.135-51.143. 8 U. S. C. § 1185 did not become effective until December 24, 1952. The statute which it replaced, the Act of June 21, 1941, was limited in its operation to time of war or to the duration of the emergency proclaimed on May 27, 1941. This emergency had been terminated on April 28, 1952 by Proclamation No. 2974, 66 Stat. c. 31. Thus, at the time of the issuance of the regulations there

was no statute forbidding the departure of citizens without a passport.[29]

The statutory authority granted by 8 U. S. C. § 1185(b) was expressly invoked by the President on January 17, 1953, Proclamation No. 3004, 67 Stat. c. 31. This proclamation by its terms expressly incorporated and confirmed the existing regulations of the Secretary relating to the necessity of a passport for travel to particular countries during war or national emergency proclaimed by the President; these, which appear at 22 CFR §§ 53.1 to 53.9, had been issued pursuant to the 1941 statute. The proclamation made no reference whatsoever to the regulations allegedly made pursuant to the 1926 statute, *viz.*, 22 CFR §§ 51.135 to 51.170 which prescribe those persons who are ineligible for passports.

In the second place, § 1185 contains no standards whatever for determining to whom passports should be denied. Although it forbids citizens to travel without passports, it nowhere contains a grant of authority to either the President or the Secretary of State to determine which categories of citizens might and which might not receive passports. On the contrary, Congress itself had made that determination two years earlier in the Internal Security Act as appears below. *Infra*, pp. 33-36. Any attempt to base the substantive regulations of the Secretary on § 1185 would stamp that section as an invalid delegation of legislative power, for the reasons which apply to the 1926 passport statute itself.

The courts cannot supply this omission on the theory that Congress intended to grant such power to the Executive. This would be judicial legislation rather than statutory construction. *Ebert* v. *Poston*, 266 U. S. 548.

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[29] A state of emergency had in fact been proclaimed earlier on December 16, 1950, Proclamation No. 2914, 64 Stat., A 455, but could have had no obstructive effect on the travel of citizens since at that time the travel control statute was operative only in actual war or during the specified emergency of 1941. 22 U. S. C. § 223 (1952 ed.), repealed by the Immigration and Nationality Act of 1952, *supra*.

The opinions in the court below demonstrate the vice of judicial legislation. Three of those opinions assumed that Congress, by enacting 8 U. S. C. § 1185, meant that the Executive should have the power to control travel; each of the opinions, however, reached a different conclusion as to the class of citizens Congress intended thus to immobilize. Thus, Judge Prettyman, for four of the judges, thought that Congress intended to deny the right of travel to adherents of the "Communist movement" (R. 191, 198). Judge Washington, concurring, thought that Congress intended to deny travel to "those whose journeying abroad is reasonably found to be contrary to the interests of the United States" (R. 200). Judge Fahy, dissenting, thought that Congress intended to give the Secretary authority to control travel "to prevent the reasonable likelihood of harm to our national defense or to the conduct of foreign affairs." (R. 243).

Leaving aside the vagueness of the standards suggested, the failure of Congress to speak on a question cannot be remedied by judicial legislation. The present case is not one of a broad or vague grant of power with ambiguous standards which under certain circumstances might conceivably be construed so as to save constitutionality. In the present case there was no grant of power at all, and there are no standards for the exercise of the power, not even vague and indefinite ones. (See cases cited, *supra*, pp. 28-29.)

The assumption of the court below that Congress was legislating travel control in the field of Communism or authorizing containment of persons because of their political associations finds no sanction either in the language of the statute or in its legislative history. The statute itself says nothing about adherents of Communism or injury to national defense or interference with foreign affairs. It says nothing about the denial of travel to persons because of membership in organizations cited by the Attorney Gen-

eral or by a Congressional Committee. In short, there was absolutely no legislative material before the court which warranted the construction which it gave to the statute.

(3) The Construction Given Below to the Statutes Is Contrary to Congressional Intent

(a) *The Internal Security Act of 1950*

Congress had itself established, at the time of the passage of the 1952 Act, a class of citizens who were ineligible to receive passports. Section 6 of the Internal Security Act of 1950, 64 Stat. 993, 50 U. S. C. § 785, made it unlawful for a member of a "Communist organization" to apply for or use a passport, but only after such organization had either registered under that Act, or there was in effect a final order of the Subversive Activities Control Board requiring that organization to register. As of the present date, neither of these events has occurred with respect to any organization; and accordingly this provision is not as yet effective.

Without conceding the constitutionality of this statute, we can note the patent disparities between it and the regulations.

1. Assuming that our constitutional system is capable of placing organizations upon an *Index*, the Act of 1950 establishes a procedure approaching due process: a quasi-judicial determination, based upon the testimony of witnesses in an open hearing and subject to judicial review. See *Communist Party* v. *Subversive Activities Control Board*, C. A. D. C. No. 11850, decided Jan. 9, 1958 upon remand in 351 U. S. 115. But the Secretary has made this determination in his regulations without any hearing, adversary or otherwise.

2. The statutory proscription applies only to members who continue to remain such with knowledge or notice that the organization has registered or has been finally ordered

to do so. 50 U. S. C. § 785(a). *Bona fide* termination of membership, for whose showing the statute provides, 50 U. S. C. § 792(i)(2), ends the applicability of the passport prohibition. In contrast, the Secretary's regulations expressly prohibit passports to *former* members if the Department concludes that they "continue to act in furtherance of Communist "interests" and under its "discipline" § 51.135(a). The Secretary does not charge that either petitioner is a member of the Communist Party; his "allegations" relate to the past (R. 23, 120).[21]

3. Other sections of the regulations deny passports, under the circumstances there set forth, to persons who have never been members if they have followed "the Communist Party line" §§ 51.135(b), 51.141(b).

4. Finally, travel is forbidden to an amorphous group whose purpose is to "advance the Communist movement" § 51.135(c).

It was principally upon the basis of the Congressional findings in the Internal Security Act that the Court below found justification for the Secretary's regulations (R. 176, 200). But since Congress in this same Act decided precisely which class of citizens should be denied passports, it must be presumed that in its judgment the remedy provided was adequate to meet the evil declared. Had Congress intended to go further and to deny passports to citizens in other categories than those covered by the 1950 Act, presumably it would have done so.

The Government has elsewhere recognized that the Internal Security Act of 1950 established a "narrow class • • • ineligible for passports"—a class very different

[21] Indeed, a careful reading of Miss Knight's affidavit in the *Kent* case indicates the speculative nature of the charge even as to past membership (R. 81).

from the amorphous groups condemned by the Secretary's regulations.[22]

The State Department has repeatedly indicated its awareness that the Secretary's regulations go far beyond the 1950 statute. It has sought, however, to justify them on the ground that they are within "the spirit of the

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[22] In *Communist Party* v. *Subversive Activities Board*, 223 F. 2d 53, rev'sd on other grounds 351 U. S. 115, the Government filed a brief in the Court below addressed to the effect of the Internal Security Act of 1950 in which it said, *inter alia*:

> "Taken together these provisions remove a Communist organization member, who retains his membership with knowledge of its registration or a final order against it, from eligibility for a passport, and penalize a person who, knowing all such facts, presents himself as one eligible for passport or uses or attempts to use a passport" (Br. 29).
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> * * *
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> "We have no doubt but that Congress can withdraw from the discretionary powers delegated to the Secretary of State, the power to grant passports to a previously ascertained class which it finds is collectively promoting the interest of the World Communist movement. It can by identifying that narrow class with precision as one totally ineligible for passports, remove any question for further determination. This finds ample support in reason" (Br. 30).
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> "Finally, the prohibitions are reasonably adapted to meeting the problem. They are applicable only to members of Communist organizations who have knowledge or notice that such organization is so registered or that such order has become final, and who, knowing their ineligibility, apply for a passport despite such fact, or illegally use one. There is no question of coverage involved. Prior to making the application, a person knows whether he is a member of the organization. He is amply forewarned of the implications of his membership and has an opportunity to avoid the liabilities imposed on members. Violation of the passport prohibitions in every case must be deliberate" (Br. 31).

law." [23] But surely some nebulous "spirit" of the Act cannot be grounds for negativing its express terms. Congress expressly predicated passport ineligibility on *present* membership in an organization under a *final* registration order; this provision is contradicted by predicating passport ineligibility on present or former membership in organizations against whom a registration order has not been issued, or, if issued, has not become final.

It was for Congress, not the Secretary, to determine the manner in which its concern about the use of passports by Communists or Communist sympathizers was to be implemented. The Secretary was not authorized by the "spirit" of the legislation to implement his notion of Congressional desires by issuing regulations of a legislative character going far beyond the statute actually enacted by Congress. *United States* v. *Symonds*, 120 U. S. 46, 49-50; *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129; *Miller* v. *United States*, *supra*; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599; *Merritt* v. *Walsh*, 104 U. S. 694.

(b) *The Expatriation Act of 1868*

Secondly, as Judge Bazelon indicated in his dissenting opinion (R. 212-213), the Secretary's regulations conflict with the Congressional policy as set forth in the Expatriation Act of 1868, 15 Stat. 223-224, R. S. § 1999, favoring freedom of expatriation. That statute, although designed principally to protect immigrants to the United States, "is also broad enough to cover, and does cover, the corresponding

[23] See testimony of Scott McLeod, Administrator of the Bureau of Security and Consular Affairs, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, p. 192; see also testimony of A. J. Nicholas, Assistant Chief of the Passport Division, before the Internal Security Subcommittee of the Senate Judiciary Committee, August 1, 1951, 83rd Cong. 1st Sess., 13-14.

natural and inherent right of American citizens to expatriate themselves." *Savorgnan* v. *United States*, 338 U. S. 491, 498-499.

Plainly, expatriation is not possible without freedom to depart from one's country. The Secretary's regulations are invalid because they necessarily prevent expatriation and are, therefore, in conflict with the Act of 1868. See also 9 Op. A. G. 356-363.

C. The Claim of Inherent Power

The government relies finally upon the argument that the Secretary has inherent foreign relations power under the Constitution to deny passports to petitioners.

Since a passport is no longer merely a "political document" evidencing the fact of American citizenship (see *Urtetiqui* v. *D'Arbel*, 9 Pet. 692, 699) but "a tool with which the Department of State can prevent the presence of any American citizen in a foreign country" (R. 182), the power claimed is truly formidable.

The government's contention is untenable for two reasons: First, the regulations constitute law-making which is beyond the Executive's power; and, second, the denial of a passport to petitioners has nothing whatsoever to do with foreign relations.

This Court's decision in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, is decisive on the first point. Presidential "power must stem either from an Act of Congress or from the Constitution itself" (*id.* at 585); the President is constitutionally empowered to execute the laws, not to make them (*ibid.*).

The Secretary's establishment of classes of American citizens who may leave the country and of those who may not is a plain exercise of law-making authority beyond the

power of the Executive Branch.[24] The subject of foreign relations is not an exception to the constitutional restriction upon presidential law making. Even the President's great power in the field of foreign relations has been only exercised in such clearly non-legislative matters as the recognition of foreign governments, *United States* v. *Belmont*, 301 U. S. 324; *United States* v. *Pink*, 315 U. S. 203; and the determination as to whether an embargo authorized by Congress should be invoked, *United States* v. *Curtiss-Wright Export Corp.*,[25] 299 U. S. 304.

Secondly, the court below has itself recognized that "the issuance of a passport is not the conduct of foreign affairs." *Dayton* v. *Dulles*, No. 13,717, cert. grant. No. 621, Oct. Term, 1957. For as the regulations show, and as Judge Bazelon said below: "'Travel is being controlled today for purposes of internal security. To call it a matter of foreign relations is mere pretense" (R. 239).

The decision to confine particular citizens within the borders of the United States involves the relationship of the government to its own citizens and a restriction upon their liberty. This is not a matter of foreign affairs as it would

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[24] We have treated the regulations as if they had been promulgated by the President. However, any power to control travel, whether it stems from a statute or otherwise, would reside not in the Secretary of State but in the President. As noted by Judge Bazelon (R. 208-210), the President has never delegated to the Secretary any of the powers that he may possess as President to control travel. Assuming that so drastic a power were capable of delegation under 3 U. S. C. § 301, 65 Stat. 712, there has been no effort to apply or conform to that statute. (*Cf.* the Executive Orders in 3 U. S. C. § 301, 1957 Supp.).

[25] The situation here would be analogous to that of *Curtiss-Wright* if Congress had declared that certain definite classes of citizens could not leave the country upon the proclamation of an emergency by the President. By suggesting this analogy, we do not, of course, concede the constitutionality of such a statute. That issue would have to be decided upon the basis of the classes as defined in the hypothetical legislation.

be if it involved relations between this country and foreign powers.[26]

Finally, as Judge Bazelon said:

> "In our complex world there are very few pure internal affairs. Foreign problems cast their shadows on the domestic scene and internal events influence foreign policy. The Department of State has declared 'That there is no longer any real distinction between "domestic" and "foreign" affairs.' If that is so, the inherent power doctrine could produce an extension of the executive power beyond any limits theretofore conceived; and the President, through his Secretary of State could preempt the internal security functions of Congress" (R. 229-230).

III.

The Regulations on their face and as applied violate the Constitution.

A. They Impair First Amendment Rights

The fundamental vice of the regulations arises from their detrimental effect upon First Amendment freedoms of belief, speech and association. This is apparent from the language of the regulations, the Department's well known practices under them, and their application to the petitioners.

Under their aegis, the Department has imposed penalties upon petitioners because of past or present political associations, writings, or views, which are entirely lawful and therefore fully protected by the First Amendment.

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[26] An example of foreign relations is the abrogation in 1913 of our commercial Treaty of 1832 with Russia because of its discrimination against American Jews. See Learsi, *The Jews in America, A History* (1954) 224-229; *The American Jewish Year Book—5672* (1911), 19-128.

The regulations also impose a prior restraint upon the future exercise of such rights, preventing one petitioner from associating with his colleagues abroad and the other from the travel which in the past has been so fruitful a source of his writing and painting.

Denial of passports to these petitioners was based upon the exercise of lawful activities on the part of both petitioners. Thus, the Department claims to be in the possession of "reports of a confidential character" to the effect that between 1939 and 1951 Dr. Briehl had been associated with organizations cited by the Attorney General or the House Committee on Un-American Activities. The date of his alleged membership in the Communist Party was said to be 1945 (R. 165).

The charges against Mr. Kent are of the same general character. In addition to his greater exercise of this "dangerous freedom,"[27] of asso tion from 1936 to 1954, the candor of the Department's allegations is a frightening revelation of the extent to which the lawful activities of Americans are subject to governmental surveillance, are recorded in official dossiers and are made the basis for the denial of other constitutional rights.

These allegations merit closer analysis. Even Communist Party membership—that *bete noire* of the postwar period—enjoys the presumption of innocence and the protection of the First Amendment in the absence of personal activities in violation of the Smith Act or other criminal statutes. *Yates v. United States*, 354 U. S. 298.

In denying the relevance of this particular charge, petitioners of course make no admission as to the facts. It is, however, not without significance that the Department habitually charges Communist Party membership

[27] Smith, *A Dangerous Freedom* (1954), quoting De Tocqueville.

solely upon the basis of evidence of membership in organizations on the Attorney-General's list.[28]

The other charges are based upon associations with alleged radicals and organizations on the goverment's subversive lists or upon the expression of political views which meet with the Secretary's disapproval. Typical examples of these have been set out above (*supra*, pp. 5, 7, 8).

It is not without significance that this Court's decisions have vindicated the petitioners' position rather than that of the Secretary on many of these issues. See *e.g. Mesarosh* v. *United States*, 352 U. S. 1; *Yates* v. *United States*, *supra*; *Rowoldt* v. *Perfetto*, 78 S. Ct. 180; *Communist Party* v. *Subversive Activities Control Board*, *supra*.

These activities ascribed to petitioners are protected from government restraint by the First Amendment. *Watkins* v. *United States*, 354 U. S. 178; *Sweezy* v. *New Hampshire*, 354 U. S. 234. Government officials may not determine what are good or bad ideas or good or bad organizations. *West Virginia Bd. of Education* v. *Barnett*, 319 U. S. 624; *Thomas* v. *Collins*, 323 U. S. 516, 545. They may not, as here, rely upon an organization's presence upon the Attorney General's list, *Barsky* v. *Board of University of State of New York*, 347 U. S. 442; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; or deny rights to citizens who are "wholly innocent of any unlawful purpose or activity". *Wieman* v.

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[28] Examples of this may be found in the records of *Nathan* v. *Dulles*, *supra*; *Foreman* v. *Dulles*, D. D. C. (C. A. 4924-54) and in the case of Dr. Linus Pauling, *Hennings* Hearings, *infra*, p. 43, where each of the persons involved was charged with Communist Party membership in the face of their sworn denials filed pursuant to § 51.142.

Updegraff, 344 U. S. 183,[29] because of membership in a "subversive" organization. In short, they may not, as here, adopt the principle of guilt by association. *DeJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242.

The fact that the sanction imposed upon a citizen for having the "wrong" ideas is confinement to this country rather than to a prison cell does not take the regulations outside the protection of the First Amendment. This Court has invalidated sanctions upon the exercise of First Amendment rights which were less direct and less oppressive. *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Thomas* v. *Collins*, 323 U. S. 516.

Moreover, as pointed out by this Court in *Watkins* v. *United States*, *supra*, at pp. 197-198, restrictions of this nature affect not only the specific individuals denied passports but the rest of our citizens, who find it expedient to modify their speech and associations in order to escape a similar fate. "If everyone who expects to travel must so comport himself as to satisfy the notions of Federal bureaucracy about political ideas, associations and activities, control over travel may well become a powerful instrument for Federal control of thought." Commager, *Where Government May Not Trespass*, New York Times Magazine, March 24, 1957, at p. 32.

We have shown how the Department seeks to use its power over the travel of American citizens in a negative sense—*i.e.*, to curb the exercise in this country of nonconformist ideas and associations. It seeks with equal impropriety to exercise its power in an affirmative sense

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[29] Judge Prettyman in the majority opinion below stated that he was construing the regulations as requiring scienter so as to comply with the requirement of the *Wieman* case (R. 191). But in upholding the right of the Secretary of State to refuse a passport to one who is a member of the Communist Party without more, he was ignoring the scienter requirement of the *Wieman* case, *supra*. Thus, his claimed construction of the regulations is in conflict with his holding.

by using such travel to mold opinion. Thus, in discussing the right of newsmen to travel to China, the Secretary's spokesman has said that "the Secretary of State's power to withdraw or withhold a citizen's passport * * * is designed as an instrument of foreign policy." O'Connor, *The State Department Defends*, Saturday Review, Jan. 11, 1958, 11 at p. 12.[30] Clearly, the control over travel is thus utilized to stifle criticism or promote espousal of a particular foreign policy.

It is illuminating to describe briefly the pattern of the State Department's conduct in this field since "in accordance with familiar principles, the * * * [regulations] must be tested by * * * [their] operation and effect." *Near* v. *Minnesota*, 283 U. S. 697, 708. The subject has received considerable scrutiny.[31]

Dr. Linus Pauling, the world renowned chemist, was refused a passport for two and a half years, beginning in 1952 (except for two passports of limited duration), on grounds including the Department's charge that an undisclosed source alleged that he was "a concealed member of the Communist Party," and a later charge of "a consistent and prolonged adherence to the Communist Party line."

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[30] See the response of Prof. Commager in the same issue of the Review at pp. 24, 70: "It is not in the best interest of the United States to induce conformity or to silence criticism by administrative penalties, for our system of government can flourish only where there is unrestricted criticism.

"It is not in the best interest of the United States to make travel—or travelers—an instrument of foreign policy, certainly not of the vagaries of State Department policy as ineptly interpreted by obscure officials."

[31] Comment 61 Yale L. J. *supra*, 174-179; Parker, *op. cit. supra*, 40 Virginia L. R. 857-861; Boudin, *The Constitutional Right to Travel*, 56 Columbia L. R. 46 (1956); Fosdick, *The Passport and the Right to Travel*, N. Y. Times Magazine, July 17, 1955, p. 8; Chew, *Passport Problems*, 12 Bulletin of the Atomic Scientists, 26 (Jan. 1956). The latter article is a reprint of Mr. Chew's testimony at the *Hennings* hearings, Nov. 15, 1955.

He received a passport from an embarrassed Department when he was awarded the Nobel Prize.[32]

Judge William Clark, formerly of the Third Circuit bench, was deprived of his diplomatic passport and his subsequent application for a passport was denied, the State Department holding that his desire to state his views in Germany on certain topics would be "inimical to the best interests of the United States." "The appropriate place" for such expressions, the State Department wrote, "is in the United States." He initiated suit and, after a Departmental hearing ordered by the District Court, *Clark* v. *Dulles*, 129 F. Supp. 950, he was given a passport.[33]

Dr. Martin Kamen, a scholar in the field of radiation physics and biochemistry, was repeatedly refused a passport from 1947 to 1955, on the ground that he was a supporter of the Communist movement, until he instituted a lawsuit against the Secretary.[34]

Dr. Otto Nathan, executor of the estate of Albert Einstein, was denied a passport for nearly two years, the State Department alleging in an affidavit filed in the Court below that the Department "after full and careful consideration has concluded that it would be contrary to the best interests of the United States" to issue one to him. *Dulles* v. *Nathan*, 225 F. 2d 29. When that court directed a quasi-judicial hearing as a condition to a stay sought by the Department, a passport was issued (*ibid.*).

These are only the more spectacular of the many cases that have occupied the courts, the press and the public the last five years. They establish incontrovertibly that the regulations have been used as an instrument to suppress

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[32] Pauling, *My Efforts to Obtain a Passport*, 8 Bulletin of the Atomic Scientists 253 (1952); and see testimony of Dr. Pauling and Administrator McLeod in *Hennings* hearings, 103-140, 155-209.

[33] *Hennings* hearings, pp. 141-155; Parker, *op. cit. supra*, 40 Virginia L. R. at 859.

[34] *Hennings* hearings, pp. 88-94, 212-214.

free expression, precisely their intendment and effect in the present cases.

Congress may abridge First Amendment rights only where "the gravity of the 'evil', discounted by its improbability justified such invasion of free speech as is necessary to avoid the danger." *United States* v. *Dennis*, 183 F. 2d 201, 212 adopted in *Dennis* v. *United States*, 341 U. S. 494, 510. The activities of the petitioners do not and cannot constitute any danger of any evil which Congress can legitimately touch.

Nor has the Government contended to the contrary. Instead, its argument has been that it may decline to give its diplomatic protection to citizens who are alleged adherents of the Communist movement. Here, it is sufficient for us to note first that whatever rights of protection do exist, inhere from the fact of citizenship, and not from the possession of a passport, Diplock, *Passports and Protection in International Law*, 32 The Grotius Proceedings 42, 45 (1946); and secondly, that there is no judicially enforceable right to such protection. See Bazelon, J. at R. 223; *United States ex rel. Keefe* v. *Dulles*, 222 F. 2d 390, 393-94, cert. denied, 348 U. S. 952.

This argument of the Government was in effect repudiated by the Court below by its recognition that the issue involved here was not that of the denial of diplomatic protection but rather the denial of the right to travel abroad. Instead, it offered two separate justifications for the acknowledged infringement of First Amendment rights, neither of which had been suggested by the Secretary.

Its first is that "Travel abroad * * * is obviously an easy method of communication between American Communist 'adherents' and the Soviet Union" (R. 191). The doctrine just quoted would deny to an amorphous group of "Communist adherents" the exercise of First Amendment rights abroad, *viz.*, communication, solely on the

ground that they had previously exercised such First Amendment rights. That the doctrine is irrational as well as noxious is indicated by the availability of alternative means of communication: The international mails, telephone and cables. We doubt that the court below would pursue its position to the logical end of authorizing the suspension of these means of communication for "adherents" of the Communist movement.

The second argument offered in justification is that "it is the unequivocal duty of the Department of State to prevent international incidents which might arouse hostile activities on the part of the Soviet Union or its satellites" (R. 191). This fanciful suggestion is unsupported by experience and the court below cited none. Moreover, on its face, it is self-contradictory.

We need not consider here the possible validity of travel regulations as legislation designed to control travel in order to prevent illegal activities abroad, or that might serve other conceivably legitimate purposes, *i.e.* such as the confinement to this country of one indicted and awaiting trial. None of the activities which fall within the scope of §§ 51.135 and 51.142 constitute illegal conduct of any kind,[35] nor is there any suggestion that the petitioners have engaged in illegal activity here or would engage in such activities abroad. Moreover, as indicated by Judge Bazelon below, legislation or regulations directed at the prohibition of travel in order to prevent illegal activities could be sustained only if narrowly drawn for that purpose (R. 51-52). Even then, important constitutional questions would arise with regard to governmental power to detain

[35] One portion of § 51.136, a section of the regulations not involved in petitioners' cases, provides for the denial of a passport "when it appears to the satisfaction of the Secretary of State that the person's activities abroad would violate the laws of the United States."

citizens for preventive purposes on suspicion alone and without evidence of guilt rather than as a preliminary to criminal proceedings based upon indictment for past unlawful activities. No decision in this Court has sanctioned such a doctrine of preventive detention.

B. They Impair Substantive Due Process

Under the regulations, the purpose of the citizen's travel is made irrelevant. Thus, here, the Department did not challenge the petitioners' stated purposes for traveling—in the one case to attend a medical convention, and in the other to paint pictures. In each case, the Department ruled that the petitioner's past political associations constituted a bar to his travel without regard to the purposes of such travel. Assuming, *arguendo*, the existence of power in the Secretary to restrain the movement of citizens through passport control or otherwise, such restraints are arbitrary and unreasonable unless related to the purpose of the travel rather than to the political heterodoxy of the citizen. The absurdity of the standards employed is epitomized by the statement that "The Department is not willing to grant you [Mr. Kent] passport facilities for travel to any countries for any purpose" (R. 10). This absence of rational basis constitutes a violation of due process under *Nebbia* v. *New York*, 291 U. S. 602 and *Schware* v. *Board of Examiners*, 353 U. S. 232.

C. Section 51.142 Imposes an Unconstitutional Test Oath

§ 51.142 requires the applicant to "subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist party." This is a test oath which Congress has never authorized, which in practice calls for much more than a statement of Communist party membership and which, when filed, is disregarded by the State Department.

In *Ex parte Garland*, 71 U. S. 333 and *Cummings* v. *Missouri*, 71 U. S. 277, this Court invalidated test oaths

involving the denial of criminal, even treasonable, conduct which had been made conditions, respectively, to the practice of law in the federal courts and the performance of religious duties. See also *Pierce* v. *Carskadon*, 83 U. S. 234.

This Court has upheld oaths confined to areas of public office or employment, *e. g.*, *Garner* v. *Board of Public Works*, 341 U. S. 716, and *Gerende* v. *Board of Supervisors*, 341 U. S. 56, and to the invocation of the complex functions of the National Labor Relations Board, *American Communications Association* v. *Douds*, 339 U. S. 382. The relief sought by petitioners is in none of these fields. They are not seeking government employment, and the only function which they require the respondent to exercise is that of issuing a passport, an administrative function performed half a million times a year. Unlike the *Douds* case, furthermore, where a non-signing union officer might continue his vocation and his union its functioning, 339 U. S. at 402, petitioners cannot lawfully travel without a passport.

Congress has never authorized the imposition of this oath upon persons wishing to exercise their right to travel. In this respect, the test oath in the present case is distinguishable from every one of the cases in which affidavits with respect to Communist party membership have been required. So drastic a substantive change in the exercise by citizens of their constitutional right to travel requires explicit legislative authority assuming that this can ever be done constitutionally. *Cf. United States* v. *Minker*, 350 U. S. 179; *United States* v. *Witkovich*, 350 U. S. 194.

Assuming, *arguendo*, that the Secretary can deprive a citizen of his right to travel, it is clear that this can only be done upon the basis of evidence justifying such denial. The imposition of the test oath is a device employed by the Secretary to evade his burden of producing evidence.

In *Cummings* v. *Missouri, supra,* at 330-332, this Court emphasized that the test oath "is not only a mode of inflicting punishment, but a mode in violation of all the constitutional guaranties, secured by the Revolution, of the rights and liberties of the people." It adopted Alexander Hamilton's statement that the oath technique was

> "* * * a subversion of one great principle of social security, to wit: that every man shall be presumed innocent until he is proved guilty. This was to invert the order of things; and, instead of obliging the state to prove the guilt, in order to inflict the penalty, it was to oblige the citizen to establish his own innocence to avoid the penalty * * *. Nothing can be more repugnant to the true genius of the common law than such an inquisition * * * into the consciences of men * * *. [The oath] substitutes for the established and legal mode of investigating crimes and inflicting forfeitures, one that is unknown to the Constitution, and repugnant to the genius of our law * * *."

Attempts to shift the burden of proof from the Government to the citizen have been stricken down in cases involving property rights, where such a shift was regarded as a denial of due process of law. *Goodyear Synthetic Rubber Corp.* v. *Department of Industrial Relations,* 122 N. E. 2d (Ohio) 503; *Philadelphia Co.* v. *S. E. C.,* 175 F. 2d 808, vac. as moot 337 U. S. 901; *Matter of Peck* v. *Cargill,* 197 N. Y. 391. In the last case, the New York Court of Appeals, stated: "It is not competent for the Legislature to place a citizen in such a disadvantageous position in order to protect his liberty or his property." (*Id.* at 395.)

Numerous courts, including the court below, have held invalid the imposition of test oaths as a condition to the use of public housing facilities. *Rudder* v. *United States,* 226 F. 2d 51. To the same effect see *Kutcher* v. *Housing Authority of Newark,* 20 N. J. 181, 119 A. 2d 1; *Lawson* v. *Housing Authority of Milwaukee,* 270 Wis. 269, 70 N. W.

2d 605, cert. den. 350 U. S. 882; *Los Angeles Housing Authority* v. *Cordova*, 130 Cal. App. 2d 883, 270 P. 2d 216, cert. den. 350 U. S. 969; *Chicago Housing Authority* v. *Clark*, 4 Ill. 2d 319, 122 N. E. 2d 522.

In practical terms, the administration of the regulations by the Secretary has been such that, unlike the situation in *Douds*, execution of the oath has not resulted in the acquisition of the benefit. Dr. Linus Pauling, for example, "signed a half dozen or perhaps more affidavits for the State Department" during a period of two years, but he did not obtain a standard passport until after he received the Nobel award. Despite these affidavits by the distinguished scientist, the Department charged that he was a "concealed Communist" (*Hennings* Hearings, *supra*, pp. 110-11). Similar cases abound, *supra*, p. 44.

The oath required by § 51.142 refers, on its face, to membership in the Communist Party. Even if thus limited in practice, it is, in the Court's words, a "test oath * * * abhorrent to our tradition." *Girouard* v. *United States*, 328 U. S. 61, 64.[36] However, the Department in practice has expanded the test oath far beyond the limits of § 51.142. Dr. Briehl was asked to "set forth your connection with any other Communist front organizations with which you may have been associated" (R. 118). Mr. Kent in addition was asked to "submit any evidence of anything that you have done which has been opposite to the Communist Party line?" (R. 62). This well illustrates the truism that "once the power is given to government officials to inquire into the associations and opinions of private individuals, there is literally no limit to the expansion of inquisitions and the injustice which must inevitably result." O'Brian, *National Security and Individual Freedom* (1955) 41.

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[36] See also Dr. Henry J. Cadbury, Chairman of the American Friends Service Committee, quoted in Miller, *Three Questions and a Conscience*, Fellowship (Dec. 1957), pp. 91, 11.

The position taken by the District Court that the petitioners could not challenge the validity of the test oath because of their refusal to submit to it is clearly untenable. "The Constitution can hardly be thought to deny one subjected to the restraints of such * * * [a regulation] the right to attack its constitutionality, because he has not yielded to its demands." *Staub v. City of Baxley*, 78 S. Ct. 277, quoting from *Jones* v. *Opelika*, 319 U. S. 103.

D. The Regulations Violate Article I, Section 9

It is apparent from the language of the regulations that ineligibility for travel is based upon past conduct. The Department's practice is to evaluate an applicant's entire lifetime in order to determine whether it reflects a "[c]onsistent and prolonged adherence to the Communist Party line * * * " (§ 51.141). Indeed its recent dissatisfaction with being limited to a review of fifteen years of one citizen's life required a lawsuit before a passport issued. *Stewart* v. *Dulles*, 248 F. 2d 602; The Washington Post, Nov. 8, 1957, p. A. 17.

Thus, the allegations against petitioners relate exclusively to past conduct. They antedate even the promulgation of the regulations, except for Mr. Kent's assertion in 1953 of his constitutional privilege before the McCarthy Committee (R. 82).

The Department may plead that it can only determine the good character of petitioners by a review of their past conduct. But to deprive a citizen of the natural right of future movement—solely on the basis of an evaluation of his past record—is penal action retrospective in character and violative of Article I, § 9 of the Constitution. One may well inquire for how many years, in the Secretary's view, the petitioners are to be prevented from travelling by reason of past activities.

The regulations also proscribe the issuance of passports to persons who "are members of the Communist Party" § 51.135(a).[37] This disqualification of a group named by the legislature is the classic form of a bill of attainder. Hence, the evolvement by a cautious Congress of the elaborate proceedings of the Internal Security Act of 1950, *supra*, for the ascertainment of organizations to be denominated communist-action organizations. The Secretary, less well advised, has preferred to use the technique of the bill of attainder.

E. The Regulations Deny Procedural Due Process in Fundamental Respects.

The regulations offend due process by a three-pronged device: The vagueness of their criteria, the concealment of evidence, and the subjection of the applicant to an uncontrolled inquiry under oath as to his associations and beliefs.

The criteria set forth in § 51.135 (*supra*, pp. 2-3) are hopelessly vague. What are the "interests" of the Communist Party? What constitutes an act "in furtherance of the interests" and under its "discipline"? What is the "Communist movement"? What is "consistent and prolonged adherence to the Communist Party line"? § 51.141.

§ 51.136 presents equally difficult problems. What are acts which are "prejudicial to the orderly conduct of foreign relations" or "to the interests of the United States"? [38]

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[37] This is supplemented by another provision that "If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings." § 51.142.

[38] Under the Secretary's conception of the best interests of the United States, §51.136 would authorize and justify the revocation of the passport of former Ambassador George Kennan for his recent noteworthy broadcasts on foreign policy over the British Broadcasting System. This would be consistent with the Secretary's use of his passport power to prevent newspaper men from going to China, *supra*, p. 43, and with his earlier revocation of Judge Clark's passport, *supra*, p. 44.

These are meaningful questions in the light of a decade of passport policy. The distinguished roster of American citizens who have been denied passports shows the irrational breadth of these criteria. The kinds of conduct attributed to the petitioners and relied upon by the Secretary in this case (*supra*, pp. 4-6) confirms this view.

These standards are a mere facade under which even the limited requirements of *Bauer* v. *Acheson*, 106 F. Supp. 445, have been avoided for five years. The standards are no more definite than the terms "un-American" or "subversive", language condemned by this Court as not susceptible of definition. *Watkins* v. *United States*, *supra*; see also *Sweezy* v. *United States*, *supra*.

The vagueness of the standards is compounded by the use of vague evidentiary terms such as "under such circumstances as to warrant the conclusion" or "on the balance of all the evidence" particularly since under the regulations the evidence itself, if it exists, is concealed from the applicant. §§ 51.137, 51.163.

The use of a term that is so vague and indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Company*, 269 U. S. 385, 391; *Small* v. *American Sugar Refining Company*, 267 U. S. 233, 238-240. The vagueness of the regulations is especially pernicious where, as here, First Amendment rights are involved. *Burstyn* v. *Wilson*, *supra*; *Winters* v. *New York*, 333 U. S. 507; *Niemotko* v. *Maryland*, *supra*; *Kunz* v. *New York*, 340 U. S. 290.

The problems created by the vagueness of the regulations are increased by the procedures adopted by the Passport Office. The proceeding is instituted by a letter of tentative denial in which the Secretary states that certain allegations have been made against the applicant (§ 51.137). The Secretary does not adopt the allegations as his own;

indeed, he has denied that they represent "charges."[39] Although these allegations are based upon reports of confidential informants of whom the Secretary usually has no knowledge,[40] the applicant is required to respond

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[39] Thus Mr. Scott McLeod when Administrator of the State Departments of Security and Consular Affairs testified with respect to the Department's letters denying Dr. Linus Pauling a passport as follows: "I think it was an allegation, not a charge or statement," *Hennings* Hearings, 188. Then ensued the following:

"Mr. Hocker: It is a little hard for a lawyer to understand the word 'allegation' in this sense. Who was making the allegation that he was a 'concealed member of the Communist Party?'

Mr. McLeod: Well, that I don't know. It is not set forth in the letter.

Mr. Hocker: Does not the letter mean that the State Department is making the allegation?

Mr. McLeod: I think to the contrary, because we do not collect the information as to who are members of the Communist Party." (*Hennings* Hearings, 194)

[40] The Department often does not know who the informants are. See the stipulation in *Kamen* v. *Dulles*, D. D. C., C. A. No. 1121-55 dated June 6, 1955, which appears in the *Hennings* hearings, 92-93. And see paragraph 4 of the affidavit of John Foster Dulles, dated January 11, 1956, in *Dulles* v. *Boudin*, *supra*, in the Court below:

"4. The information referred to in inquiry 3 was obtained from various sources. Those sources included:

(a) public source information such as newspapers, congressional documents, and other media of public information;

(b) informants whose identity is known to the Department and whose credibility has ben evaluated by the Department; and

(c) informants whose identity is not known to the Department, but whose credibility has been evaluated and made known to the Department by the Government agency furnishing the information."

In the *Hennings* Hearings, in discussing the Department's general practice, the following colloquy took place:

"Senator Hennings: So that in reply to Mr. Hocker's question your answer then, it would seem to me, would have to be, would it not, that such letters are written and have been written based upon information from sources unknown to the State Department?

Mr. McLeod: Yes, sir." (p. 195)

under oath in an affidavit with respect to Communist Party membership (§ 51.142) and related matters (*supra*, p. 5). *Cf. Matter of Peck v. Cargill*, *supra* at 393.

Subsequently the applicant receives a hearing at which no adverse witnesses appear and no evidence is presented against him. He alone is examined by the Passport Office with respect to the allegations in the Secretary's letter. He is required, as here, to embody his answers in an affidavit. § 51.137. Thereafter, the Passport Office renders a decision based upon secret evidence allegedly existing in its files (*id.*) This decision is made "after consultation with other interested officers" (§ 51.137) whose disclosures to the Passport Office are unknown to the applicant.

The applicant may thereafter appeal to the Board of Passport Appeals under whose procedures evidence is likewise concealed (§§ 51.151-51.170). The Board makes a secret recommendation to the Secretary, who then renders a decision in summary form because of "security considerations."

In five years under the regulations, it has not been the practice of the Department to produce witnesses to support allegations under §§ 51.135 or 51.136. That explains both the judicial criticism of its hearings, *Boudin v. Dulles*, 136 F. Supp. 218, aff'd and mod. 225 F. 2d 29; *Nathan v. Dulles*, 129 F. Supp. 951; *Clark v. Dulles*, 129 F. Supp. 950 and the grant of passports when open evidentiary hearings threaten the Department (*supra*, p. 44).

It is no wonder that former Secretary of State Acheson has described the basic loyalty program underlying these procedures as "a grave mistake and a failure to foresee consequences which were inevitable." *Acheson, A Democrat Looks at His Party* (1955) 127. In discussing that program, Mr. Acheson points out that "it was not realized at first how dangerous was the practice of secret evidence and secret informers, how alien to all our conceptions of

justice and the rights of the citizen, even though he was also an employee" (*id.* at 129). He concludes by criticizing the extension of such practices "to a citizen seeking a passport which the government requires before he may travel abroad" (*ibid.*).

Identically, unfair procedures were declared invalid by the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester*, 277 F. 2d 708. This decision, not appealed by the Government, invalidated the Coast Guard regulations for the screening of merchant seamen. The case is of particular pertinence here because it has removed travel restrictions for so-called security reasons upon the hundreds of thousands of Americans employed as seamen.[4]

The decision in the *Parker* case follows the well established principle laid down by this Court that administrative action predicated upon undisclosed facts is invalid. *Morgan* v. *United States*, 304 U. S. 1, 18; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 302-304; *Lloyd Sabaudo* v. *Elting*, 287 U. S. 329, 335-336; *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274, 288-289.

A fuller analysis of the procedural deficiencies of the regulations appears in the brief for the petitioner in *Dayton* v. *Dulles*, *supra*.

Finally, we note that the procedures under the regulations involve certain dangers against which a citizen is constitutionally entitled to protection. In the absence of confrontation, the examination under oath of the pass-

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[4] The elimination of this program on the ground that the travel of seamen does not affect national security was recommended by a distinguished committee of lawyers. Report of the Special Committee on the Federal Loyalty Security Program of the Association of the Bar of the City of New York (p. 142).

Significantly, the Committee also recommended the termination of our International Organizations Employees Loyalty Program on the ground that national security did not require the screening of American citizens employed by the United Nations and other international public organizations here and abroad (p. 52).

port applicant with respect to a lifetime of associations and beliefs, on the basis of such vague criteria, creates a real danger of an unwarranted perjury prosecution, which recent history confirms. *Cf. United States* v. *Lattimore*, 215 F. 2d 847; *United States* v. *Lattimore*, 127 F. Supp. 405; *United States* v. *Remington*, 191 F. 2d 246, cert. den. 343 U. S. 907.[42]

Conclusion

These cases represent a new type of interference with civil liberty—liberty of movement. The Government has never presented any adequate justification for its wholesale denial of so vital a right of Amerian citizens. The Secretary has arrogated this power to himself without either legislative or constitutional justification.

His passport regulations, substantively and procedurally, go far beyond anything authorized by the Congress or the President. They openly seek to prevent the future exercise of First Amendment rights because of governmental disapproval of the manner in which such rights were previously exercised.

The issues in this case have been well summarized by Judge Edgerton below:

> "The Secretary proposes to continue restricting the personal liberty of a citizen because statements by informants whom the Secretary does not identify have led him to think that if the citizen goes abroad he will do something, the nature of which the Secre-

[42] On vagueness, in connection with compulsory testimony in the political area, see *O'Connor* v. *United States*, 240 Fed 2d 404; *Bridges* v. *United States*, 199 F. 2d 811, rev. 346 U. S. 209 and *United States* v. *Hautau*, 43 Fed. Supp. 307; see also briefs for the parties in this Court, *Gold* v. *United States*, 352 U. S. 985, reflecting the kind of evidence deemed sufficient for a conviction in cases involving charges of Communist Party membership.

tary does not suggest, which the Secretary thinks, for reasons known only to him, will be contrary to what, for reasons known only to him, he conceives to be 'the national interest.' If Congress or the President had undertaken to authorize this, serious constitutional questions would arise. May the government deprive a citizen of his constitutional liberty to go abroad (1) without a jury trial, (2) without a definite standard of guilt, (3) without sworn testimony, and (4) without an opportunity to confront his accusers or know their identity? May it deprive him of this liberty because of the way he has exercised his First Amendment rights of free speech, press, and assembly? * * * But neither Congress nor the President has undertaken to give the Secretary the authority he claims" (R. 241).

From this summary, Judge Edgerton concluded:

"We have temporized too long with the passport practices of the State Department. Iron curtains have no place in a free world" (R. 240).

Respectfully submitted,

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Appendix

22 U. S. C. § 211a

The Act of July 3, 1926, 44 Stat. 887, 22 U. S. C. § 211a provides, in pertinent part, as follows:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

22 U. S. C. § 212

The Act of June 14, 1902, 32 Stat. 386, 22 U. S. C. § 212 provides, in pertinent part, as follows:

> No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.

Internal Security Act of 1950, § 6

Section 6 of the Internal Security Act of 1950, 64 Stat. 993, 50 U. S. C. § 785 provides, in pertinent part, as follows:

> (a) When a Communist organization as defined in paragraph (5) of section 782 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

8 U. S. C. § 1185

Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. § 1185, as codified, provides in pertinent part:

§ 1185. Travel control of citizens and aliens during war or national emergency—Restrictions and prohibitions on aliens.

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

(1) [There follow restrictions enumerated (1) through (7) not here pertinent.].

* * *

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

The Expatriation Act of 1868

The Expatriation Act of 1868, 15 Stat. 223-224, R. S. § 1999, 8 U. S. C. § 800 (1940 Supp.) reads as follows:

"WHEREAS the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government."

Proclamation 3004

The pertinent portions of Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. c31, entitled "Control of Persons Leaving or Entering the United States By the President of the United States of America", are as follows:

A PROCLAMATION

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President * * * and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

* * *

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws there-

of the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provisions of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

Executive Order No. 7856

Executive Order No. 7856, 22 CFR §§ 51.1-51.74 is entitled and constitutes the "Rules Governing the Granting and Issuing of Passports in the United States." Several typical excerpts from that extensive document are set forth to indicate that it relates to procedural rather than to substantive matters:

* * *

3. Unless a request is made by the parental or other guardian that a passport be denied, passports may be issued to minors upon their own application.

4. Children may execute applications in their own behalf when of sufficient intelligence to understand the statements, and the meaning of the oath of allegiance to the United States, contained in the applications.

* * *

10. A minor brother or sister may be included in the passport of an older brother or sister.

* * *

39. The applicant must submit with his application duplicate photographs not more than 3 by 3 inches and not less than 2½ by 2½ inches in size, unmounted, printed on thin paper on a light background, showing the full front view of the features of the applicant, and taken within six months of the date they are submitted.

40. When the applicant applies for a passport he should be accompanied by one credible witness who is an American citizen, has known the applicant for a period of two or more years, and has a definite place of residence.

* * *

101. A person born abroad whose father was born in the United States and at the time of the applicant's birth had not ceased to be a citizen of the United States must submit with his application evidence of the father's birth in this country as required in the preceding paragraph.

* * *

119. The Secretary of State may require such additional evidence of citizenship as in his judgment may be necessary to establish the citizenship of an applicant for a passport.

* * *

124. The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

125. Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of these rules, the protection of the United States may be withdrawn from him while he continues to reside abroad.

126. The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to these rules and not inconsistent therewith.

* * *

Regulations of the Secretary of State

22 CFR §§ 51.135-51.143

On August 28, 1952 the Secretary adopted the passport regulations herein involved with the following preamble (17 F. R. 8013):

> Pursuant to the authority vested in me by paragraph 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F. R. 681; 22 CFR 51.77), under authority of section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887; 22 U. S. C. 211(a)), the regulations issued on March 31, 1938 (Departmental Order 749) as amended (22 CFR 51.101 to 51.134) are hereby further amended by the addition of new sections 51.135 to 51.143 as follows:

The regulations, as amended, read as follows:

> § 51.135. *Limitations on issuance of passports to persons supporting Communist movement.*—In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:
>
> (a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interest and under the discipline of the Communist Party;
>
> (b) Persons, regardless of the formal state of their affiliation with the Communist Party, who en-

gage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;

(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement.

§ 51.136* *Limitations on Issuance of passports to certain other persons.* In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interest of the United States.

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* Prior to the Secretary's amendment of January 18, 1956, 21 F. R. 336, this section read as follows:

"§ 51.136 *Limitations on Issuance of Passports to Persons Likely to Violate Laws of the United States.* In order to promote the national interest by assuring that the conduct of foreign relations shall be free from unlawful interference, no passport, except one limited for direct and immediate return to the United States, shall be issued to persons as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities while abroad which would violate the laws of the United States, or which if carried on in the United States would violate such laws designed to protect the security of the United States."

§ 51.137 *Notification to persons whose passport application is tentatively disapproved.*—A person whose passport application is tentatively disapproved under the provisions of § 51.135 or § 51.136 will be notified in writing of the tentative refusal, and of the reasons on which it is based, as specifically as in the judgment of the Department of State security considerations permit. He shall be entitled, upon request, and before such refusal becomes final, to present his case and all relevant information informally to the Passport Division. He shall be entitled to appear in person before a hearing officer of the Passport Division, and to be represented by counsel. He will, upon request, confirm his oral statements in an affidavit for the record. After the applicant has presented his case, the Passport Division will review the record, and after consultation with other interested offices, advise the applicant of the decision. If the decision is adverse, such advice will be in writing and shall state the reasons on which the decision is based as specifically as within the judgment of the Department of State security limitations permit. Such advice shall also inform the applicant of his right to appeal under § 51.138.

§ 51.138 *Appeal by passport applicant.*—In the event of a decision adverse to the applicant, he shall be entitled to appeal his case to the Board of Passport Appeals provided for in § 51.139.

§ 51.139 *Creation and functions of Board of Passport Appeals.*—There is hereby established within the Department of State a Board of Passport Appeals, hereinafter referred to as the Board, composed of not less than three officers of the Department to be designated by the Secretary of State. The Board shall act on all appeals under § 51.138. The Board shall adopt and make public its own rules of

procedure, to be approved by the Secretary, which shall provide that its duties in any case may be performed by a panel of not less than three members acting by majority determination. The rules shall accord applicant the right to a hearing and to be represented by counsel, and shall accord applicant and each witness the right to inspect the transcript of his own testimony.

§ 51.140 *Duty of Board to advise Secretary of State on action for disposition of appealed cases.*—It shall be the duty of the Board, on all the evidence, to advise the Secretary of the action its finds necessary and proper to the disposition of cases appealed to it, and to this end the Board may first call for clarification of the record, further investigation, or other action consistent with its duties.

§ 51.141 *Bases for findings of fact by Board.*—(a) In making or reviewing findings of fact, the Board, and all others with responsibility for so doing under §§ 51.135 to 51.143, shall be convinced by a preponderance of the evidence, as would a trial court in a civil case.

(b) Consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line will suffice, prima facie, to support a finding under § 51.135 (b).

§ 51.142. *Oath or affirmation by applicant as to membership in Communist Party.*—At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.

§ 51.143.* *Applicability of Sections 51.137-51.142.* Except for action taken by reason of noncitizenship or geographical limitations of general applicability necessitated by foreign policy considerations, the provisions of §§ 51.137-51.142 shall apply in any case where the person affected takes issue with the action of the Secretary in granting, refusing, restricting, withdrawing, canceling, revoking, extending, renewing or in any other fashion or degree affecting the ability of such person to receive or use a passport.

22 CFR §§ 51.151-51.170

The Rules of the Board of Passport Appeals promulgated by the Secretary on January 4, 1953 have the following preamble (19 F. R. 161):

Pursuant to the authority vested in the Board of Passport Appeals by the Regulations of the Secretary of State issued on August 28, 1952 (17 F.R. 8013; 22 C.F.R. 51.139) and pursuant to the authority vested in the Secretary of State by paragraph 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681; 22 C.F.R. 51.77); under authority of section 1 of the act of Congress approved July 3, 1926 (44 Stat. 887; 22 U.S.C. 211(a)), the regula-

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* Prior to the Secretary's amendment of January 18, 1956, 21 F. R. 336, this section read as follows:

"§ 51.143 *Applicability of Sections 51.135-51.142.* When the standards set out in § 51.135 or § 51.136 are made relevant by the facts of a particular case to the exercise of the discretion of the Secretary under § 51.75, the standards in §§ 51.135 and 51.136 shall be applied and the procedural safeguards of §§ 51.137-51.142 shall be followed in any case where the person affected takes issue with the action of the Department in granting, refusing, restricting, withdrawing, cancelling, revoking, extending, renewing, or in any other fashion or degree affecting the ability of a person to use a passport through action taken in a particular case."

tions issued on March 31, 1938 (Departmental Order 749) as amended (22 C.F.R. 51.101 through 51.143) are hereby further amended by the addition of the following Rules of the Board of Passport Appeals as adopted by the Board, and approved by the Secretary for incorporation as sections 51.151 through 51.170 of Subpart B of Part 51 of 22 C.F.R.:

They read as follows:

§ 51.151 *Organization of Board.*—The Secretary of State shall appoint a Board of Passport Appeals consisting of three or more members, one of whom shall be designated by the Secretary as Chairman. The Chairman shall assure that there is assigned to hear the appeal of any applicant a panel of not less than three members including himself or his designee as presiding officer, which number shall constitute a quorum.

§ 51.152 *Decisions of the Board.*—Decisions shall be by majority vote. Voting may be either in open or closed session on any question except recommendations under § 51.140, which shall be in closed session. Decisions under § 51.140 shall be in writing and shall be signed by all participating members of the Board.

§ 51.153 *Counsel to the Board.*—A Counsel to be designated by the Secretary of State, shall be responsible to the Board for the scheduling and presentation of cases, aid in legal and procedural matters, information to the applicant as to his procedural rights before the Board, maintenance of records and such other duties as the Board or the Chairman, on its behalf, may determine.

§ 51.154 *Examiner.*—The Board may, within its discretion, appoint an examiner in any case, who

may, with respect to such case, be vested with any or all authority vested in the Board or its presiding officer, subject to review and final decision by the Board, but, an applicant shall not be denied an opportunity for a hearing before the Board unless he expressly waives it.

§ 51.155 *Chairman.*—The Chairman, or his designee, shall preside at all hearings of the Board, and shall be empowered in all respects to regulate the course of the hearings and pass upon all issues relating thereto. The Chairman, or his designee, shall be empowered to administer oaths and affirmations.

§ 51.156 *Prior administrative remedies.*—It is required that prior to petitioning for an appeal, an applicant shall (a) exhaust the administrative remedies available in the Passport Office, as set out in § 51.137, and (b) comply with the provisions of § 51.142, as a part of his application, if deemed necessary by the Passport Office.

§ 51.157 *Petition.*—An applicant desiring to take an appeal shall, within thirty calendar days after receipt of the advice of adverse decision by the Passport Office file with the Board a written petition under oath or affirmation which shall, in plain and concise language, refute or explain the reasons stated by the Passport Office for its decision.

§ 51.158 *Delivery of papers.*—Petitions or other papers for the attention of the Board may be delivered personally, by rgistered mail, or by leaving a copy at the offices of the Board at the address to be stated in the advice of adverse action furnished applicant by the Passport Office.

§ 51.159 *Notice of hearing.*—Applicant shall receive not less than five calendar days notice in writ-

ing of the scheduled date and place of hearing which shall be set for a time as soon as possible after receipt by the Board of applicant's petition.

§ 51.160 *Appearance.*—Any party to any proceedings before the Board may appear in person, or by or with his attorney, who must possess the requisite qualifications, as hereinafter set forth, to practice before the Board.

§ 51.161 *Applicant's attorney.*—(a) Attorneys at law in good standing who are admitted to practice before the Federal courts or before the courts of any State or Territory of the United States may practice before the Board.

(b) No officer or employee of the Department of State whose official duties have, in fact, included participation in the investigation, preparation, presentation, decision or review of cases of the class within the competence of the Board of Passport Appeals shall, within two (2) years after the termination of such duties appear as attorney in behalf of an applicant in any case of such nature, nor shall any one appear as such attorney in a case of such class if in the course of prior government service he has dealt with any aspects of the applicant's activities relevant to a determination of that case.

§ 51.162 *Supplementary information to applicant.*—The purpose of the hearing is to permit applicant to present all information relevant and material to the decision in his case. Applicant may, at the time of filing his petition, address a request in writing to the Board for such additional information or explanation as may be necessary to the preparation of his case. In conformity with the relevant laws and regulations, the Board shall pass promptly and finally upon all such requests and shall advise

applicant of its decision. The Board shall take whatever action it deems necessary to insure the applicant of a full and fair consideration of his case.

§ 51.163 *Hearings.*—The Passport file and any other pertinent Government files shall be considered as part of the evidence in each case without testimony or other formality as to admissibility. Such files may not be examined by the applicant, except the applicant may examine his application or any paper which he has submitted in connection with his application or appeal. The applicant may appear and testify in his own behalf, be represented by counsel subject to the provisions of § 51.161, present witnesses and offer other evidence in his own behalf. The applicant and all witnesses may be cross-examined by any member of the Board or its counsel. If any witness whom the applicant wishes to call is unable to appear personally, the Board may, in its discretion, accept an affidavit by him or order evidence to be taken by deposition. Such depositions may be taken before any person designated by the Board and such designee is hereby authorized to administer oaths or affirmations for the purpose of the depositions. The Board shall conduct the hearing proceedings in such manner as to protect from disclosure information affecting the national security or tending to disclose or compromise investigative sources or methods.

§ 51.164 *Admissibility.*—The Board and the applicant may introduce such evidence as the Board deems proper. Formal rules of evidence shall not apply, but reasonable restrictions shall be imposed as to the relevancy, competency, and materiality of evidence presented to the Passport Office's stated reasons for its decision and/or to the application of § 51.135 or § 51.136 to applicant's case.

§ 51.165 *Argumentation.*—All argumentation shall be directed to the application of the passport regulations to the facts of the particular case. The Board will permit no oral argument or motions relative to the legality or propriety of the hearing or other procedures of the Board. Submission of such argument or motions will be confined to the filing of written briefs, objections, or motions to be made a part of the record. The Board will not undertake to consider any such motion or contention.

§ 51.166 *Privacy of hearings.*—Hearings shall be private. There shall be present at the hearing only the members of the Board, Board's Counsel, official stenographers, Departmental employees concerned, the applicant, his counsel, and the witnesses. Witnesses shall be present at the hearing only while actually giving testimony.

§ 51.167 *Misbehavior before Board.*—If, in the course of a hearing before the Board, an applicant or attorney is guilty of misbehavior, he may be excluded from further participation in the hearing. In addition, he may be excluded from participation in any other case before the Board.

§ 51.168 *Transcript of hearings.*—A complete verbatim stenographic transcript shall be made of hearings by qualified reporters, and the transcript shall constitute a permanent part of the record. Upon request, the applicant and each witness shall have the right to inspect the transcript of his own testimony.

§ 51.169 *Notice of decision.*—The Board shall communicate the action recommended under § 51.140 on all cases appealed to it, to the Secretary of State. The decision of the Secretary of State shall be notified in writing to the applicant. Such notice shall

be given the applicant as promptly as possible after his hearing before the Board.

§ 51.170 *Probative value of evidence.*—In determining whether there is a preponderance of evidence supporting the denial of a passport the Board shall consider the entire record, including the transcript of the hearing and such confidential information as it may have in its possession. The Board shall take into consideration the inability of the applicant to meet information of which he has not been advised, specifically or in detail, or to attack the creditability of confidential informants.

* * *

22 CFR §§ 53.1-53.8

The pertinent portions of the Secretary's regulations entitled "Control of Persons Entering and Leaving the United States in Wartime" are as follows:

§ 53.1 *Limitations upon travel.*—No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into the continental United States, the Canal Zone, and all territories, continental or insular, subject to the jurisdiction of the United States, unless he bears a valid passport which has been issued by or under authority of the Secretary of State and which, in the case of a person entering or attempting to enter any such territory, has been verified by an American diplomatic or consular officer either in the foreign country from which he started his journey, or in the foreign country in which he was last present if such country is not the one from which he started his journey, or unless he comes within one of the exceptions prescribed in §§ 53.2 and 53.3 * * *.

§ 53.2 *Exceptions to regulations in § 53.1.* No valid passport shall be required of a citizen of the United States or a person who owes allegiance to the United States:

* * *

(b) When traveling between the United States and any country or territory in North, Central or South America or in any island adjacent thereto: *Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States via any country or territory in North Central or South America or in any island adjacent thereto, for which a valid passport is required under §§ 53.1-53.9: * * *.

* * *

§ 53.5 *Prevention of departure from or entry into the United States.* (a) Nothing in this part shall be construed as prohibiting the Secretary of State or his representative at a port in the United States from preventing the departure from or entry into the United States, including the Canal Zone and all territories, continental or insular, subject to the jurisdiction of the United States, of a citizen of the United States or a person who owes allegiance to the United States unless he bears a passport, card of identification, or other document of identity issued by or under authority of the Secretary of State, notwithstanding the fact that he may be destined for or arriving from a place outside any such territory of the United States for which a valid passport is not required under the regulations in this part.

(b) Nor shall anything in the regulations in this part be construed as prohibiting the Secretary of State or his representative at a port in the United

States from preventing temporarily the departure from or entry into the United States, including the Canal Zone and all territories, continental or insular, subject to the jurisdiction of the United States, of a citizen of the United States or a person who owes allegiance to the United States, notwithstanding the fact that such person may bear a valid passport, card of identification, or other document of identity issued by or under authority of the Secretary of State or be destined for or arriving from a place outside any such territory of the United States for which a valid passport is not required under the regulations in this part.

* * * *

§ 53.8 *Discretional exercise of authority in passport matters.*—Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 481

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Petitioners,

v.

JOHN FOSTER DULLES, Secretary of State.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I.

The Secretary of State Lacked the Authority to Prevent the Petitioners from Travelling Abroad

The Government, in this Court, has altered its position considerably from that taken below in urging the validity of the actions of the Secretary of State in denying passports to the petitioners. It will be helpful at the outset to indicate the issues now conceded by the Government and which are, therefore, no longer a matter of controversy between the parties.

(1) The right to travel abroad is a fundamental constitutional right to be equated with the right to travel from state to state [hence can be abridged only in conformity with the Fifth Amendment (Gov't. Br. pp. 26-27).

(2) 22 U. S. C. § 211a does not grant either the President or the Secretary of State the authority to control travel (Gov't. Br. p. 43, fn. 37, 44).

(3) There is no inherent power in the Executive branch to restrict travel abroad of citizens (Gov't. Br. pp. 90-91, fn. 97).

The controversy as to the source of the Secretary's authority to restrict travel by the petitioners is thus narrowed to the Government's contention, made here for the first time, that the sole source of authority for the Secretary's power to determine which citizens may travel and which may not stems from the provisions of 8 U. S. C. § 1185. The authority claimed for the Secretary under the statute is implied by the Government on the basis of the following reasoning:

(1) The language of the statute as well as the legislative history of the predecessor Acts of 1918 and 1941 show a clear intent of Congress to control travel;

(2) Since the Secretary's authority to issue passports was the device employed to effectuate this control of travel, Congress intended to delegate to the Secretary discretion to determine who may and who may not travel.

According to the Government, it follows, therefore, that 8 U. S. C. § 1185 "must be read as a delegation to the Secretary of State of authority * * * to prevent, where necessary or appropriate, the departure or entry of individual citizens by denying them the passports necessary to such travel" (Gov't. Br. pp. 52-53). As we will demonstrate, however, this argument is logically unsound and poses insuperable constitutional difficulties.

A. The Statute Does Not Expressly Grant any Authority to the Secretary

By its terms, § 1185 contains no express grant of power to the Secretary to control travel. Although it makes it a crime to leave the country without a passport, it contains no provisions empowering the Secretary to determine who may or who may not leave the country. It neither sets forth standards as a guide for making such a determination nor does it commit that function to the Secretary.[1] So large and sweeping a grant of power to the Executive as is claimed here is not ordinarily implied in the absence of an unequivocal Congressional declaration. *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479; *Hannegan* v. *Esquire*, 327 U. S. 146. On the contrary, as this Court said in *Ex parte Endo*, 323 U. S. 283, at 300:

> "* * * We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law-makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."

The Government contends, however, that this statute, which contains no express grant of power, is meaningless unless it is interpreted as authorizing the Secretary, in his unfettered discretion, to deprive citizens of the right to travel (Br. pp. 56-57).[2] But this is a fictitious, not a real, dilemma. Contrary to the Government's view, there are alternative interpretations of the statute, interpretations

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[1] Indeed, it was not until these cases reached this Court, that the Government discovered that § 1185 contained a grant of power to the Secretary.

[2] In its brief in *Dayton* v. *Dulles*, No. 621, the Government carries this argument one step further, contending that the provision would be entirely futile unless the Secretary could bar citizens from travel on the basis of secret evidence, and without judicial review.

to be preferred to that of the government, since, as we show below, the Government's view of the statute would only serve to render it unconstitutional.

In the first place, on the face of the statute, it is quite conceivable that Congress did not intend to deprive anyone of the right to travel, but intended only that if one wished to travel, he must first obtain a passport so that the Government would have a record of who travels and where and when. This is not an uncommon approach to licensing statutes. Thus, all jurisdictions in this country make it a crime to operate a motor vehicle without first obtaining license tags from the responsible Commissioner of Motor Vehicles. It has never been suggested that a provision of this nature contains an implied power to the Commissioner to refuse to issue license tags in his discretion. There is no more reason to imply such power in the Secretary and every reason against such an implication.

Secondly, even if § 1185 is considered to be a travel control statute, it does not follow that the Secretary is thereby empowered to make the policy judgment as to who may and who may not travel. It is more logical to assume that the standards for the application of any travel control program would be supplied by Congress and not by the Secretary. And as we show in our main Brief (pp. 33, 36), Congress has in fact done so in the provisions of the Internal Security Act of 1950. Thus § 1185 can be given the necessary meaningful content as a travel control statute if read in conjunction with the Internal Security Act of

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[3] Concededly, since the statute has no legislative history on this point (Gov. Br. p. 48, fn. 46, p. 52, fn. 53), there is no reason to reject this interpretation of the provision. We treat below, pp. 7-10 with the Government's contention that § 1185 should be interpreted in the light of the legislative history of earlier statutes.

1950.[4] It is true that if the prohibition of § 1185 is applied within the confines of the 1950 Act, it would have a narrower scope than that claimed by the Secretary and would frustrate his program of travel control. It would not, however, leave the statute without any content and hence would not make it a nullity. Thus, the dilemma posed by the Government does not, in fact, exist. It results only from the Secretary's assumption that the welfare of the country requires that he have power to control travel in his uncontrolled discretion, and that, therefore, of necessity Congress must have granted him that power. Such bureaucratic empathy, however, is no index of Congressional intent. And as Mr. Justice Holmes said, dissenting, in another situation involving freedom of speech: "it would take very strong language to convince me that Congress ever intended to give such a despotic power to any one man." *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U. S. 407, 437.

There is a positive reason for not implying this power: here involved are a liberty of movement admitted by the Government (Br. p. 26) and the right of each petitioner "to live and work where he will." *Allgeyer v. Louisiana*, 165 U. S. 578, 589. These rights are of particular relevance to petitioners to whom the ability to travel abroad is an essential adjunct to their professions. Statutes in derogation of such constitutional rights, like those in derogation of the common law, must be strictly construed. *Sutherland*, Statutes and Statutory Construction, § 6206.

The Government argues (Br. p. 73) that the 1950 Internal Security Act has no relevance here because it imposes criminal penalties on the application for and granting of

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[4] It is irrelevant in the consideration of Congressional intent that these provisions have not yet become effective because the full administrative and judicial process has not as yet been completed with respect to any organization. Congress must have assumed that the 1950 Act would some day be effective. Moreover, if, in fact, Congressional intent has become frustrated because of the failure of the 1950 Act to become effective, it still remains the province of Con-

a passport. Hence, according to the Government, the statute is not indicative of the standards prescribed by Congress as to who may or who may not obtain a passport for the purpose of travel, nor is it a limitation on the power elsewhere granted to the Secretary to prescribe such standards. The fallacy in this argument is that there is no statute granting the Secretary power to prescribe such standards,[5] and Congress has nowhere else spoken on the standards to govern the Secretary in granting or denying a passport. Finally, the Government has elsewhere admitted that Congress in the Internal Security Act has identified a "narrow class with precision as one totally ineligible for passports." (See our main Brief, p. 35, ftn. 22.)

The Government also argues that our view of § 1185 is impermissible, since it would require the Secretary to grant passports in all cases where previously he had the discretion to deny passports (Govt. Br. pp. 44, 57). But this is precisely the result which must be reached. For whatever power or discretion the Secretary may have had to deny passports at the time when a passport was merely a political document,[6] that power is of necessity destroyed when the

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[5] This same fallacy underlies the Government's contention that the 1950 Act is not to be read as intending to "narrow the Secretary's traditional discretion". (Br. p. 73). Although the Secretary may have had a "traditional discretion" to deny passports when a passport was merely a political document, he does not have and never did have a "traditional discretion" to prevent travel abroad by citizens. Accordingly, to interpret the 1952 Act, dealing with travel control, in the light of the 1950 Act, dealing with the same subject, does not in any way limit or interfere with any traditional discretion of the Secretary, since he has none in this field. Concededly, his only power to control travel must flow from a specific mandate of Congress.

Of course, even if the Secretary had such a "traditional discretion" to control travel, it would have been disposed of by the 1950 Act. "* * * Where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; * * *." Mr. Justice Clark concurring in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 884.

[6] See, however, our discussion in footnote 10.

passport becomes a prerequisite to the constitutional right to travel. To suggest otherwise would mean that the Secretary could then, in his unlimited discretion, deny citizens a constitutional right. Indeed, this same result must be reached even in the absence of § 1185. For, even apart from the statutory prohibition against travel without a passport, the course of history and international relations has altered the character of a passport from the mere political document that it was at the time of *Urtetiqui* v. *D'Arbel*, 9 Pet. 692 (See Gov't Br. p. 29) to a necessary prerequisite for travel. (See our main Brief at p. 18.)

B. The Legislative History of the 1918 and 1941 Statutes.

The Government argues, that the 1952 Act, since it was in effect a re-enactment of the 1918 and 1941 statutes, must be read in the light of the legislative history of these statutes. There are, however, several considerations which militate against the Government's conclusion from the legislative history of those statutes that the Secretary is empowered today to control travel in his unlimited discretion.

In the first place, each statute was enacted in the light of a precise existing situation, was directed to a precise evil, and was limited in duration to that precise evil. Thus, the 1918 statute was enacted during World War I for the precise purpose of preventing espionage and sabotage on behalf of the German Government (See Gov't Br. pp. 46-48). By its terms it expired on the termination of that war. The 1941 statute, enacted prior to our entrance into World War II, but in the light of existing hostilities, was also enacted in order to impede espionage activities on behalf of the German government of that date (Gov't Br. pp. 50-51). That statute, too, was by its terms, of limited duration (See our main Brief at p. 30).

Even if these statutes are construed as containing a broad grant of power to the Secretary to control travel,

that power, broad as it was, since it contained a limitation on constitutional rights, would be restricted to the precise purpose for which it was enacted, *i.e.*, the protection of the war effort in World War I and II against espionage and sabotage. Nothing in the legislative history of either statute supports the conclusion that the Secretary was empowered to prescribe general political standards as a condition of the right to travel.[7] Cf. *Ex Parte Endo*, *supra*. Nor is there anything in this legislative history to suggest that the statute was enacted as a measure to control travel by Communists or Communist sympathizers. Moreover, unlike the situation which obtained at the time of the passage of the 1918 and 1941 statutes, at the time of the passage of the 1952 legislation there were in effect specific restrictions on the granting of passports under the Internal Security Act of 1950. And the restrictions imposed by that Act are precisely in the field, *i.e.*, Communism, covered by the Secretary's regulations.

Even assuming that the legislative history of the 1918 and 1941 statutes demonstrates a Congressional intent to vest in the President, for the periods covered by those statutes, an unfettered discretion to prevent travel abroad, without any limits or standards whatever, this would not advance the Government's case. As set out in our main Brief (pp. 28-30) and as developed more fully below, such a view of those statutes would only result in their nullification. There would be little purpose in transporting into

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[7] Neither in the case of the present petitioners, nor in the case of the petitioner in *Dayton* v. *Dulles*, has the Secretary found or suggested that it was necessary to prevent their travel abroad in order to protect the country against espionage or sabotage. Certainly, so far as the present petitioners are concerned, nothing in the voluminous allegations against them asserted by the Department warrants any inference of their engaging in such activities.

the 1952 statute the infirmities of the 1918 and 1941 statutes, since to do so would result only in destroying the 1952 statute. Unless the statute is to be completely nullified, its interpretation should be confined within constitutional limits.

Moreover, there is no administrative history of these statutes that would justify an inference of Congressional affirmation of a power in the Secretary of State to control the travel of citizens in his unlimited discretion. As noted in the Government's Brief (pp. 54-55, fn. 55), the 1918 and 1941 statutes show a history of enforcement of the provisions relating to travel by aliens but no history of enforcement of the provisions authorizing restrictions on citizens.[8] The lack of invocation of this authority and the resulting absence of court cases interpreting and applying the authority granted is easily explicable in the light of historic events. Of necessity, citizens did not travel during the actual hostilities that obtained during both World Wars I and II. Moreover, as conceded by the Government, political tests as a condition of the right to travel were not generally required by the Secretary until sometime in 1950 (Br. p. 64). Thus, prior to 1950, there were no occasions for judicial consideration of this claimed power since it was invoked, if at all, in only rare instances.

In any event, so far as it may have bearing on congressional intent in 1952, the history of the 1918 and 1941 statutes show at most an unexercised delegation of power to the executive to prevent travel by citizens. Consequently,

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[8] See *infra*, pp. 15-16 for the entirely different constitutional basis upon which the governmental power to restrict travel by aliens has been rested.

there is no basis for inferring that Congress by the 1952 statute was indicating its approval of any executive conduct.[9]

C. The Argument that 8 U. S. C. § 1185 is to be Read in Conjunction with 22 U. S. C. § 211a

As we have already indicated, the Government concedes that 22 U. S. C. § 211a does not contain a grant of authority to the Secretary to control travel in any respect. The Government, indeed, goes further and maintains that § 211a granted no authority to the Secretary but was only a confirmation of his inherent authority to issue passports (Br. 32). We will concede for purposes of argument that so long as a passport was a political document and not a prerequisite to travel, the discretion to grant or deny a passport lay in the executive department and was not subject to judicial review at all, since it was purely a political matter.[10] So long as citizens could travel abroad without a passport, they could not complain to the courts if the Secretary of State told them they could travel

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[9] The Government's contention (Br. pp. 93-95) that "Congress has * * * enacted without challenge, over the past 143 years, legislation similar to that now in force" is patently untenable. Aside from the 1918 and 1941 statutes, which as is here shown were never sustained or apparently even applied as to citizens, the Government recites only an 1815 statute forbidding citizens to cross into enemy territory (Br. p. 44). The statute, limited as it was in scope, was also of extremely short duration, since the War of 1812 was ended shortly thereafter. See Mr. Justice Frankfurter concurring in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 613.

Moreover, the age of the statutes and their existence on the books in the absence of judicial validation are no indicia of validity. Cf. *Winters* v. *New York*, 333 U. S. 507. For example the Government recites that during the Civil War, the Secretary of State imposed travel controls without congressional authority (Br. p. 44). By the Government's own admission, the Secretary lacked power to do so.

[10] Because it bears no relevance to the issues in this case which involve the constitutional right to travel, we have not directly challenged the Government's assertion that the Secretary was authorized in his discretion to deny a passport where such denial did not deprive the citizen of the right to travel. It should be noted, however, that

abroad, but would not have the right to call upon this government to protect them in the event of difficulty. This denial of political protection involved no impairment of constitutional rights and was a matter solely within the discretion of the Secretary.

But one cannot jump from that premise to the conclusion that the Secretary has any discretion whatever to control travel. Nor is it permissible to assume, in the absence of an unequivocal declaration by Congress, that it intended by 28 U. S. C. § 1185 to equate the unreviewable discretion of the Secretary to make a political decision with an unreviewable discretion to deny a constitutional right.

This Court has repeatedly condemned statutes which required the obtaining of a permit from any government official as a prerequisite to the exercise of a constitutional right. *Saia* v. *New York*, 334 U. S. 558; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Largent* v. *Texas*, 318 U. S. 418; *Niemotko* v. *Maryland*, 340 U. S. 268; *Burstyn* v. *Wilson*, 343 U. S. 495; *Gelling* v. *Texas*, 343 U. S. 960, and most recently, *Staub* v. *Baxley*, 355 U. S. —, 78 S. Ct. 277 (See quotation from the *Staub* case in our main Brief, at p. 29.)

Thus, the contention of the Government that § 1185, read in conjunction with § 211a, grants to the Secretary the

this position of the Government has not been undisputed. Although, as indicated in its brief (pp. 35-37), some Secretaries and Attorneys General took the position that the Secretary had unlimited discretion in this field, other Secretaries and Attorneys General took the contrary position and argued that a citizen had a right to a passport which could not be denied. See *e.g.*, the authorities cited in Department of State, *Foreign Relations of the United States* (1907), pp. 920, 1083; also Freund, *Administrative Powers Over Persons and Property* (1928) 97, 519-521, and particularly the prescient warning "It would mean an executive power of a political character over individuals quite out of harmony with American legislative practices" (p. 97). This Court has never considered the problem and aside from the dicta recited by the Government at pp. 38-39 of its brief, there is no judicial authority on the question.

power in his unfettered discretion to withhold a permit for the admittedly constitutional right to travel would only serve to render the statute unconstitutional.[11]

D. The Statute, Under the Government's View, Is an Invalid Delegation of Power

Finally, as we have shown (main Br. pp. 28-30), the statute, if given the interpretation urged by the Government, would constitute an invalid delegation of legislative authority since it contains no standards to serve as a guide as to which citizens may travel and which may not. The Government suggests two answers to this problem, neither of which is tenable.

The Government claims that the statute does impose certain standards (Br. p. 97). It points to the fact that the statute can be invoked only in case of war or proclaimed national emergency.[12] But this deals only with the occasion for invocation of the statute and does not in any way furnish any standards as to the basis for classifying those

[11] The Government suggests (Br. p. 91, fn. 98) that it is not open for the petitioners here to challenge the constitutionality of 8 U. S. C. § 1185, since the issue was not raised in the complaint in the District Court, and further that if the issue had been raised, this would have required the convening of a three-judge District Court. The short answer to this is that we maintained below, as we maintain here, that the Secretary is not granted authority under any statute to prevent the travel of the petitioners abroad. Indeed, we did not understand at the time that we filed our complaint that the Secretary claimed any authority under 8 U. S. C. § 1185, since his regulations purported to be based upon 22 U. S. C. § 211a. As we have indicated earlier, the claim of authority as flowing from 8 U. S. C. § 1185 is being made for the first time in this Court. Since the Secretary did not claim to be acting under the authority of 8 U. S. C. § 1185 at the time he took the action complained of against the petitioners, there was no occasion for the petitioners to challenge the constitutionality of a statute which was not being invoked.

[12] We challenge below, pp. 22-28, the claim that any emergency justifying restrictions upon travel existed in 1955 when petitioners applied for passports.

who may and those who may not travel. In addition, says the Government, "By making the passport the instrument for effecting control, Congress has also limited the exercise of the control power to cases relating to the national defense and the related conduct of foreign affairs in time of war or emergency" (Gov't Br. p. 97).

But this vague language furnishes no standards or guide whatsoever as to who may travel and who may not.[13] The Government asserts that "We need not be concerned with the question of whether a delegation of travel control power with no limitation * * * would be valid" (Br. p. 97) But, although the Government refuses to meet the challenge posed by that question, that is precisely the question before this Court—since 8 U. S. C. § 1185 contains no standards whatsoever.

The Government's brief is of assistance on this point precisely because of the multiplicity of vague criteria which it proposes to read into the statute. A few examples will suffice:

> (a) "to prevent the reasonable likelihood of harm to our national defense or to the conduct of our foreign affairs"[14] (Gov't Br. p. 92)
>
> (b) "the executive should have wide discretion and wide authority of action"[15] (Gov't Br. p. 94)

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[13] See *e.g.*, the "public good" is not an adequate standard. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. Nor is any adequate standard furnished where the licensing authority may grant a permit when he "deems it proper or advisable", *Largent* v. *Texas*, *supra*; or where it is not "prejudicial to the best interests of the people." *Gelling* v. *Texas*, *supra*.

[14] This is a partial quotation from Judge Fahy's *dissenting* opinion in the Court below (R. 72-73) which recognizes the absence of "more specific criteria" (R. 72) and admittedly attempts to give "valid content" to the statute (R. 73) in view of the constitutional problems involved.

[15] The source is a Committee report on the 1918 wartime statute, H. Rep. No. 485, 65th Cong., 2d Sess.

(c) "'preventive measures against activities that may cause international misunderstandings * * *'" [16] (Gov't Br. p. 95)

(d) the President's "broad discretion" in exercising "the foreign affairs powers" (Gov't Br. p. 95).

Not a single one of these alleged standards—none of which appears in the statute—can be supported under the decisions of this Court on the subject of delegation of authority.

In *Schechter* v. *U. S.*, 295 U. S. 495, and *Panama Refining Company* v. *Ryan*, 293 U. S. 388, the statutes involved made elaborate declarations as to the national emergency which unquestionably existed. In addition, the statutes and regulations involved in those cases related exclusively to matters of business; not to the exercise of First Amendment rights. Nevertheless, the broad authority found by the courts to have been given to the President was held to constitute an unlawful delegation of authority. In the *Panama Refining* case, Chief Justice Hughes stated:

> "* * * It gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment," (p. 415)

and

> "If the Congress can make a grant of legislative authority of the sort attempted by Section 9(c), we find nothing in the Constitution which restricts the Congress to the selection of the President as grantee. The Congress may vest the power in the officer of its choice or in a board or commission such as it may select or create for the purpose. * * *" (p. 420)

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[16] District Judge Holtzoff's opinion in *United States* v. *Peace Information Center*, 97 F. Supp. 255, 261 involving a very different statute.

This last passage is most applicable to the present case where, indeed, it was not the President but the Secretary of State who established the classifications of persons whose movements were to be restricted.

The regulations herein under attack—if they can be deemed to have the support of the statute—must fall under Mr. Justice Cardozo's statement in *Schechter Corp. v. U. S.*, 295 U. S. 495, 551:

> "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, if I may borrow my own words in an earlier opinion, *Panama Refining Co. v. Ryan*, 293 U. S. 388, 440."

The Government argues, secondly (Br. pp. 93-97), that since the power delegated is in the field of foreign affairs, the standards need not be as precise as in other fields. But there are two fallacies to this contention. In the first place, it cannot be argued that a vague standard rather than a precise standard would suffice here in the face of the fact that there is no standard prescribed, vague or precise. Secondly, as we have established in our main brief and as indicated by Judge Bazelon below (R. 225-238) the power exercised here is not the conduct of foreign affairs.

The cases cited by the Government do not support its contention that legislative power may be delegated in such vague terms. The alien cases relied upon by the Government rest upon the dual doctrine that aliens have limited rights and that the executive has inherent power to control their movements: See *U. S. ex rel. Knauff v. Shaughnessy*, 338 U. S. 537; *Shaughnessy v. U. S. ex rel. Mezei*, 345 U. S. 206.

Thus, in the *Knauff* case, the Court stated at 542-3:

> "At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right * * *.

"Petitioner contends that the 1941 Act and the regulations thereunder are void to the extent that they contain unconstitutional delegations of legislative power, but there is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. * * *. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

"Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive * * *. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, e. g., as was done here, for the best interests of the country during a time of national emergency * * *."

See also *Mezei*, 345 U. S. 206 at 210.

Neither of the principles supporting the validity of the delegation in these cases has any applicability here.

Nor does *United States* v. *Curtiss Wright Corporation*, 299 U. S. 304, lend any support to the government's contention. In that case, the delegation of power to the President was in fact quite precise. It empowered the President to invoke an embargo on arms in the case of a specific armed conflict then currently proceeding between the countries of Bolivia and Paraguay. The delegation was narrow and confined to a very specific situation. Moreover, in sustaining the delegation, the Court emphasized that it was necessary to delegate power since negotiations with other countries were involved. Thus, the Court said at pages 319-320:

"It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—*a power which does not require as a basis for its exercise an act of Congress* * * *. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, *congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissable were domestic affairs alone involved.* * * *" (Emphasis supplied.)

Here, of course, the statute and the action of the executive claimed to be authorized under the statute do not in any respect involve negotiations with foreign powers.

As a demonstration that the nature of the power exercised by the Secretary in classification of the citizens who may and those who may not travel is legislative in character, we need only turn to the Government's Brief. In support of the reasonableness of the regulations and of the action of the Secretary, the Government, at pages 60-73, elaborately sets out the policy considerations underlying the Secretary's classification. The materials upon which it relies—governmental reports and congressional hearings—are characteristically the type of materials normally employed by Congress in enacting legislative measures and in supporting the reasonableness of these legislative measures. But as we have demonstrated in our main brief (Br. 29), the executive has no power to enact legislation, and all of the considerations so elaborately set out by the Government in its brief were appropriate considerations for Congress and not for the Secretary of

State, for under our constitutional scheme, it is not the function of the Secretary to make policy judgments of that character.[17]

Since, as acknowledged by the Government, the constitutional right to travel abroad is to be equated with the right to travel from state to state, the situation is no different than if the Attorney General had, in the absence of clear and unequivocal legislative authorization, issued regulations forbidding the travel of Communists or Communist sympathizers from one state to another, and had argued in this Court in justification of such a prohibition considerations similar to those recited by the Government here. Clearly, such an assertion of power would be rejected on the basis of want of authority in the Attorney General without any consideration as to whether Congress could or could not constitutionally enact such restrictions; or whether the policy considerations adduced by the Attorney General justified his action. Cf. *Hannegan* v. *Esquire*, 327 U. S. 146; *Curtis* v. *Benson*, 222 U. S. 78.

Similarly, the argument of the Government (Br. pp. 52-53) that Congress can delegate to the Secretary of State authority "to prevent, where necessary or appropriate the departure or entry of individual citizens" would by implication sanction a delegation of power to the Attorney General in a time of national emergency to impose restrictions on citizens' freedom to speak and write "where necessary or appropriate." According to the Government's logic (Gov't Br. pp. 92-93), such a delegation would not be invalid because (a) it would be limited to a period of national

[17] Moreover, as we pointed out in our main brief (pp. 31-36), it was on the basis of these identical considerations that Congress enacted the prohibitions upon the granting of passports contained in the Internal Security Act of 1950. And it is not for the Secretary to differ with Congress as to the remedies to be enacted to meet the declared evil. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579.

emergency, and (b) the Attorney General's restrictions upon freedom of speech, press and assembly would be subject to the constitutional limitations of the First and Fifth Amendments. In short, the Government takes the untenable position that Congress may delegate to the Executive the power to impose such restrictions on constitutional rights as the Executive may deem "necessary or appropriate," subject only to the condition that the restrictions conform with due process of law.

II

Assuming the Existence of Power in the Secretary to Control Travel, the Regulations Violate Constitutional Rights

A. "Reasonable Restrictions" Upon a Fundamental Right

After conceding the fundamental constitutional character of the right to travel (Gov't Br. pp. 26-27) the Government treats the entire constitutional problem raised by its regulations in a few pages at the end of its brief bearing the significant title "THERE IS NO CONSTITUTIONAL OBJECTION TO THE SECRETARY'S REFUSAL TO ISSUE PASSPORTS, FOR FOREIGN TRAVEL, ON GROUNDS *related* TO PRESENT OR *negr-past* COMMUNIST PARTY MEMBERSHIP" (Gov't Br. p. 89; emphasis supplied).

In support of this proposition the Government argues that it may place "reasonable restrictions" upon the travel of its citizens, and that this Court's decisions in *American Communications Association* v. *Douds*, 339 U. S. 382, and various alien deportation cases are an answer to petitioners' First Amendment claims (Gov't Br. pp. 67-69).

We do not think that the Government can concede the basic character of the right of movement which we have discussed in our main Brief, pages 18-24, and then seek to undercut that right by the concept of "reason-

able restrictions" (Gov't Br. p. 89). The right of movement, of locomotion, of travel is of so fundamental a character that it is preposterous to suggest that it is subject to regulation on the same grounds of reasonableness that are applicable to business regulation.

> "* * * Therefore, in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. * * *" Mr. Justice Frankfurter concurring in *Kovacs* v. *Cooper*, 336 U. S. 77, 95.

Restrictions upon movement from one country to another are, as we have previously indicated (see main Brief p. 23), only different in degree from confinement to more constricted areas, such as imprisonment, internment and concentration camps.[18] That this point has not escaped the Government is indicated by its reliance upon the English internment cases in the two World Wars, *Rex* v. *Halliday* (*Ex parte Zadig*) [1917] A. C. 260; *Liversidge* v. *Anderson* [1942] A. C. 206; *Greene* v. *Home Secretary* [1942] A. C. 284; *Rex* v. *Home Secretary* (*Ex parte Budd*) [1942], 2 K. B. 14 (Gov't Br., *Dayton* v. *Dulles*, No. 621, Oct. Term 1957, pp. 53-54, 72-74). And equally significant and disturbing is the Government's reliance herein upon the Japanese internment cases; *Korematsu* v. *United States*, 323 U. S. 214; *Hirabayashi* v. *United States*, 320 U. S. 81 (Gov't Br. pp. 87, 91, 94).

We note these references only to indicate agreement that the essential constitutional problems in all these re-

[18] See also South Africa's existing system of pass laws and "Group Areas Acts". Gardiner, *The South African Treason Trial*, I Journal of the International Commission of Jurists 42, 45 (1957). Cf. Brecht, *The Concentration Camp*, 50 Col. L. Rev. 761 (1950); Bramstedt, *Dictatorship and Political Police* (1945) 118 *et seq.*

strictions upon movement are the same. The differences in the Government's power in the two kinds of cases will be discussed below when we address ourselves to the alleged existence of a national emergency.

The Government's citation of authority for the proposition that "reasonable restrictions" may be placed "upon the travel of its citizens" (Gov't Br. pp. 89-90) is quite surprising. *Blackmer* v. *U. S.*, 284 U. S. 421, involved a very different problem, the enforcement of a citizen's duty "to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned" (*Id.* at 438). On the same theory every witness summoned before a grand jury or court is to that degree compelled to be where he would prefer not to be; yet no one would suggest that this authorizes the Government to place "reasonable restrictions" upon the travel of its citizens inside the United States itself.

The reference to Jefferson's draft of a Fundamental Constitution for the Commonwealth of Virginia (Gov't Br. p. 90) means no more than what *Blackmer* holds, namely, the duty of a citizen to return to his country to carry out his duties of citizenship.

The conscription cases upon which the Government relies (Br. p. 94) do no more than enforce the citizen's obligations even though the performance of those obligations may be in distant lands. The Government does not contend herein that the petitioners' travel for the purposes indicated will in any way prevent them from carrying out their obligations as citizens.

In addition, the restriction upon the free movement of citizens carries with it substantial limitations upon their exercise of their freedoms of speech and association. The relationship between these two principles—that of movement and of speech—has been noted in our main Brief (pp. 22-24) and has best been stated by District Judge Wyzanski

in an article which deserves full reading. (Wyzanski, *Freedom to Travel*, Atlantic Monthly, October 1952, 66.) Freedom of speech, to be meaningful, must carry with it the right not only to say what one will but where one will. Dr. Briehl, for example, wishes to exercise his right to freedom of speech and professional association in Europe. If, indeed, the right of travel may be assimilated to that of speech, what is there in this Court's decisions that authorizes "reasonable restrictions" upon freedom of speech?

We are not discussing convictions for disorderly conduct by reason of speeches already made and which constitute a breach of the peace, *Feiner* v. *New York*, 340 U. S. 315; or speech advocating violent overthrow under circumstances of danger to the Government which may warrant restrictions on First Amendment rights, *Dennis* v. *United States*, 341 U. S. 494, but see *Yates* v. *United States*, 354 U. S. 298; nor even about permits to use city streets and parks. *Cf. Hague* v. *C. I. O.*, 307 U. S. 496, and *Cox* v. *New Hampshire*, 312 U. S. 569. The petitioners are not seeking to use any public facilities whatsoever. They are being prevented from doing something in the future and this proscription is a form of prior restraint, a matter discussed further below (pp. 29-31). (See Emerson, *The Doctrine of Prior Restraint*, 20 Law and Contemp. Prob. 648 [1955].)

B. The Alleged Emergency

The Government is in error in assuming (Gov't Br. p. 72) that petitioners concede the existence of a national emergency and one which could constitutionally justify restrictions upon freedom of movement.

Many things are done and may be done in time of actual war which cannot constitutionally be done in time of peace, no matter in what horrendous terms the Executive may describe the current situation. There is a qualitative difference between armed conflict or actual danger of invasion,

and the political warfare which has been going on this past decade. See Mr. Justice Burton, concurring in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 582.

The English internment cases are a good example of what was believed to be a necessary act of self-defense on the part of the Government. Yet, even there we found dissent among the judges.[19] The Japanese internment cases were another example; there, also, it is believed by many that we went too far. (See authorities collected in Emerson and Haber, *Political and Civil Rights in the United States* (1952) 597, and particularly, Rostow, *The Japanese American Cases—a Disaster* (1945), 54 Yale L. J. 489.) The situation today has no similarity to the "grave national danger" referred to in *Liversidge* v. *Anderson*, *supra*, page 252. Neither before the Korean conflict nor during it nor after it has there been a problem comparable to that presented by the internment cases, American or English, and one which would justify preventing the movement of American citizens to the European continent. There is no war, the United States and the Soviet Union have diplomatic relations, the citizens of the Soviet Union and other

[19] It should be noted that the English cases relied upon by the government were decided in an entirely different constitutional framework. Since England does not have a written Constitution, the judiciary there, unlike the situation here, has neither the power nor the responsibility of reviewing legislation to determine whether or not it conforms with constitutional requirements. Moreover, so far as English practice may be looked to to determine the reasonableness of the action complained of here, it is significant that England has not adopted in any measure the restrictive practices on travel imposed by our State Department, even though it may fairly be assumed that the supposed danger facing this government as the result of travel by alleged Communist sympathizers is equally present in England. The English attitude is interestingly reflected in a recent issue of *The Economist*, March 29, 1958, p. 1124, quoting from its issue a century ago, March 27, 1858: "It has been laid down with good sense by the English Government that a British passport simply identifies a man by name as a British citizen, and neither can nor ought to attempt anything further. * * *"

members of the Eastern bloc travel to the United States for purposes of education, culture, sports and pleasure, and we reciprocate.[20] This is a far different situation from that of war-time where no one is permitted to go into enemy countries or areas of armed hostility except for purposes which would aid the war.

The distinction between a necessary restriction upon movement caused by war and the kind of political operation involved herein is indicated by the detention provisions of the Internal Security Act of 1950. These authorize the President to intern "each person as to whom there is reasonable ground to believe that such person probably will engage in or probably will conspire with others to engage in acts of espionage or of sabotage," 50 U. S. C. § 813, during an "internal security emergency". Such an emergency may be declared only in one of the following cases: "(1) Invasion of the territory of the United States or its possessions, (2) Declaration of war by Congress, or (3) Insurrection within the United States in aid of a foreign enemy."

The original bill authorizing this detention provision contained a fourth condition upon which the President might declare the emergency, namely: "Declaration of an 'internal security emergency' by concurrent resolution of the Congress." (96 Cong. Rec. 14581.) This provision was stricken from the bill because of the opposition of Senators McCarran, Ferguson and others who insisted upon a limitation of the circumstances under which American citizens could be detained. (96 Cong. Rec. 14585-6, 14591-2, 14598, 14623 [1950].)

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[20] See also *e.g., Exchange of Medical Films*, Agreement between the United States of America and the Union of Soviet Socialist Republics, Dep't of State (1955), Treaties and other International Acts Series 3409.

We did not and do not view 8 U. S. C. § 1185 as a grant of power to the Secretary to impose political tests on the movements of American citizens. In view of the fact that 8 U. S. C. § 1185 was not operative at the time the Regulations were promulgated and therefore could not be a source of power, and that the Secretary relied in the preamble to the Regulations and in the courts below exclusively upon 22 U. S. C. § 211a and his inherent power—both of which are now discarded—he was evidently of the same opinion. Therefore, we did not believe it necessary previously to consider the problem as to whether world conditions are such as to justify the declaration of a national emergency which entailed as a consequence the control of travel on political grounds.

However, if 8 U. S. C. A., § 1185 were to be regarded as an authority for the regulations which antedate it, we do contend that nothing in world conditions or otherwise can rationally justify the refusal of the State Department to permit the petitioners to travel abroad for the purpose of promoting their professions. In other words, whatever national emergency does exist is irrelevant to and furnishes no occasion to deny the right of the petitioners to travel abroad on the basis of the facts shown in this case. Moreover, it is unnecessary for us to consider here the extent of restrictions on travel that would be permissible in the event of actual war, as envisioned by the 1918 and 1941 statutes. Suffice it to say that even if the President is authorized today to declare a national emergency for some purposes, the extent of restrictions that may be justified by such an emergency cannot be equated with the type of restrictions that might be reasonable in the event of an actual outbreak of war. Cf. *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543; and even in the event of a war, the determination as to the rationality of any particular measure must depend upon the actual nature of the critical situation facing the country. *Hirabayashi* v. *United States*, 320 U. S.

81. Thus, the action taken in the *Hirabayashi* case would not have been upheld under the circumstances of World War I.

Let us assume that, as the Government contends, 8 U. S. C. § 1185 authorizes travel control in the event of a Presidential declaration of national emergency. This would not insulate the declaration from judicial scrutiny to determine whether the emergency exists and whether it is a justifiable basis for the controls. This is particularly true where the controls are sought to be imposed some years after the declaration of emergency. In the *Chastleton* case Mr. Justice Holmes stated with respect to an emergency declaration by a *legislature* that

> "* * * a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. * * * And still more obviously so far as this declaration looks to the future it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed. * * *" (264 U. S. at 547-548.)

In that case, this Court held that, had the case revolved around the existence of the emergency at the time of its consideration by the Supreme Court, it would have taken judicial notice of the fact that there no longer existed in the District of Columbia a housing emergency sufficient to validate the Rent Control Act of 1919, as successively reenacted. It remanded the case to the trial court for a determination of the facts because the existence of the emergency at different times was deemed material.

In *East New York Savings Bank* v. *Hahn*, 326 U. S. 230, Mr. Justice Frankfurter, in upholding the constitutionality of the 1943 extension of New York State's Mora-

torium Law, distinguished *Chastleton* as dealing with "quite a different situation" (326 U. S. at 235). The difference lay in the care and frequency with which the legislature had renewed the law from time to time, and adjusted its terms, based in each case on a full investigation of the facts:

> "The whole course of the New York moratorium legislation shows the empiric process of legislation at its fairest: frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions, and safeguarding the future on the basis of responsible forecasts. * * * —* * *." (326 U. S. at 234-5.)

See also *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426, 433.

In *Woods* v. *Miller*, 333 U. S. 138, 147, Mr. Justice Jackson's concurring opinion upholding federal rent control in 1948 denied however "that war powers may be indefinitely prolonged merely by keeping legally alive a state of war that had in fact ended."

The Court of Appeals for the Ninth Circuit in a recent opinion upholding the judicial power to look behind a presidential declaration of national emergency relating to possession of gold bullion, made an observation even more striking in its applicability to personal liberties:

> "It seems vital as a matter of national policy that emergency regulations and almost dictatorial powers granted or conceded in the turmoil of war, cold war, economic revolution and the struggle to preserve a balanced way of life, should be discarded upon return to normal conditions, lest we grow used to them as the fittings of ordinary existence. Executive regulations drafted and confirmed for an emergency should expire with the emergency. There will be time enough to revivify these if another emergency require and Congress be willing. Of course if it seems essential to continue the subject matter of these criminal regulations now, Congress can so declare. But the power lies in Congress." *Bauer* v. *United States*, 244 F. 2d 794, 797.

We submit that whatever may be the powers of the Government in a situation of actual war such as existed at the time of the Act of 1918 and was reflected in the national emergency statute of 1941, there is no emergency at the present time which could possibly justify the restriction upon travel of American citizens to countries to which millions of Americans are permitted to and do travel annually—particularly where the basis of the denial of the right is concededly the exercise of right of association which we next discuss.

C. The First Amendment

The Government seeks to meet our First Amendment argument [21] (main Br. pp. 39-47) in several ways.

First, it tells us with lurid quotations that passports have been forged or fraudulently used by Russian agents. (Gov't Br. pp. 60-62). Such crimes, cognizable under 18 U. S. C. §§ 1541-1546, are completely irrelevant to the constitutional problems involved in this case. The petitioners are American citizens seeking valid passports from their government for legitimate professional purposes. They are being denied these passports because of allegations that they made statements and had associations—for the most part many years ago—admittedly lawful and within the protection of the First Amendment, but of which certain government officials disapprove.

The commission of crime by one group of persons cannot be a justification for the denial to another group of the *future* exercise of fundamental rights of speech, association and movement—particularly where the denial is based upon their *past* lawful political conduct. Further, since the Regulations of August 28, 1952 were an attempt to comply with "the spirit" of the Internal Security Act (see our main Br. pp. 35-36) which is directed against Com-

[21] The government's suggestion that the First Amendment might not have been relied upon by petitioners (Gov't Br. p. 78) can hardly be made seriously. See *e.g.*, R. 3, 33, 58, 102, 118, 172. This was the very issue decided by the Court below. R. 192, 201, 217.

munism—not espionage—the Government's present attempt to invoke 8 U. S. C. 1185 is "like most afterthoughts in litigated matters * * * without adequate support in the record." Chief Justice Stone, concurring in *Hague* v. *C. I. O.*, 307 U. S. 496, 522.

In the Godkin Lectures of 1955, Mr. John Lord O'Brian has cogently analyzed various of our contemporary infringements of liberty including the "supervision and limitation of the freedom of travel by American citizens" (O'Brian, *National Security and Individual Freedom*, [1955] p. 48). In words directly applicable to the Government's present attempt to introduce the espionage theme, he notes: "Attempts are sometimes made to justify these restraints as necessary to prevent sabotage and espionage, but affirmative evidence casts some doubt on this plausible excuse" * * * (*Id.*, 49). The purpose and effect of such procedures he reminds us, is "to constrain the freedom of thought and of association on the part of the individual". (*Id.*, 26).

Secondly, the Government now refers to "grounds related to present or near-past Communist Party membership". (Gov't Br. p. 89). We call attention to two aspects of this careful phrasing:

The term "grounds related" *supra*, p. 19, points up what we have said before in our main Brief, pp. 39-47, that Communist Party membership is only one factor in the standards and inquiry under the Secretary's regulations. The heart of the regulations is § 51.135(b) which refers to "activities which support the Communist movement" (Petrs' Br. p. 2). An examination of the allegations against both petitioners will show that the denial of passports to them is, in fact, predicated upon this kind of lawful activity; hence, the use of the word "related" is quite appropriate from the Government's point of view.

The second significant point is the Government's reference to "near-past Communist Party membership" (Br. p. 89). This phrase suggests a recognition of its lack

of right to enquire into Communist Party membership which is not "near-past". Yet 51.142 of the Regulations requires the applicant to make a full disclosure as to present and past membership in the Communist Party. The regulations do not suggest, nor does the Government, that a partial disclosure would suffice.

We now come to the heart of the Government's argument on the constitutional issue. It says that passports can be denied to persons who have a "connection with the world Communist movement" because "foreign travel which is purportedly innocent in purpose may well turn out to be an instrument of the Soviet Union—for espionage, for communication of information, as a courier, for the other uses to which a firm adherent of another power may be put" (Gov't Br. p. 98). This is an insulting comment to make, even in the abstract, in a case involving respected members of the community who have never been charged with any crime and whose sworn statements of specific reasons for travel have never been challenged by the Government.

In any event, from a constitutional point of view, we submit that this test cannot be upheld. The Government does not have the right to prevent a citizen from engaging in a lawful activity—such as travel abroad either to paint pictures or represent medical societies at international conventions—because in the Government's view it "may well turn out" to be otherwise.[22] This is indeed the doctrine of prior restraint with a vengeance. It "may well turn out" that American citizens who have had a so-called "connection with the world Communist movement" may commit crimes within this country, yet no responsible person would dare suggest their internment.

The Secretary's passport policy is part of the "new system of preventive law applicable to the field of ideas

[22] On the Government's theory, the Secretary could lawfully prohibit, for the same political reasons, the travel for health of the physically ill recently discussed in Rusk, *Tours for the Disabled*, The New York Times, April 6, 1958, p. 48.

and essentially different from traditional American procedures" [23] (O'Brian, *supra*; p. 22).

Whatever may be the relative freedom from constitutional limitations of government control over its employees, see *Garner* v. *Board of Public Works*, 341 U. S. 716, this Court's view of preventive law is quite clear. In *Near* v. *Minnesota*, 283 U. S. 697, 720, it said: "Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege." In *Schneider* v. *State*, 308 U. S. 147, 162, *Lovell* v. *Griffin*, 303 U. S. 444, 451-2 and *De Jonge* v. *Oregon*, 299 U. S. 353, 365, this Court rejected a system of prior restraint. See also Field, J. in *In re Ah Fung*, 1 Fed. Cases 213, 217 (D. Calif.).

Two further observations are appropriate:

(1) The nature and purpose of the sanctions here imposed justify the authoritative reminder that "there can be no conviction for a criminal attempt without proof of a specific intent to effect some consequence which constitutes a crime." Sayre, *Criminal Attempts*, 41 Harv. L. Rev. 821, 841 (1928). For lacking here are both elements: the act and the intent.

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[23] As Mr. O'Brian points out:

"* * * Until these new administrative policies were adopted, this nation had adhered firmly to the traditional Anglo-American method of combating activities of an antisocial character. Under that policy no direct attempt was made by law to prevent the wrongful act before it was committed other than by warning the citizenry generally of what the consequences would be. Once the wrongful act had actually been committed, its author and only the author was punished by the state. This elementary principle had long been embodied also in civil procedures.

"The advantage of this age-long legal system lay in the relatively precise selection that was made centering upon the wrongdoer, leaving the rest of the community free from direct governmental action * * *." (O'Brian, *supra*, pp. 22-23).

See also Brunstedt, *supra*, note 18, p. 139, critically quoting the notorious Reinhard Heydrich: "According to the liberal school of thought, only action inimical to the state and the organization of the enemy of the state, which makes this action possible has been combated: National Socialism, on the other hand, is concerned with the intellectual forces of the opponents. It is they whom it wants to reorganize and strike."

(2) And since the Government argues that petitioners' First Amendment rights must yield to national security, it must be reminded that *Schenck* v. *United States*, 249 U. S. 47, and its successors, were based upon consummated acts, not upon undefined dangers speculatively conceived to be possible in the future.

The Government's view as to who is a "Communist Party member or under party control" has been shown to be so latitudinous as to be devoid of rational basis. This matter cannot be dealt with in the abstract. Whether we study the cases of Dr. Linus Pauling and Dr. Otto Nathan and many others discussed in the Henning's Committee hearings (our main brief, pp. 43-44), or review the particular associations attributed to petitioners—it is clear that to the Secretary the lawful exercise of First Amendment rights through connection with organizations on the Attorney General's list is equivalent to Communist Party membership and Party control.

American Communications Association v. *Douds*, 339 U. S. 382, does not afford the slightest justification for the broad power sought herein. In that case, this Court approved of what it regarded as an indirect form of pressure upon labor unions to get rid of Communist Party leaders by otherwise denying them the use of the facilities of the National Labor Relations Board. The statute therein involved did not require non-Communist affidavits as a condition to the exercise of any fundamental right. It did not provide, for example, that the unions could not function, engage in collective bargaining, call strikes, and organize workers. It did not prevent Communists from being officers of the union. It deprived those unions of a specific benefit, whose importance we would not minimize, but which nevertheless left the unions free to function as at least two great unions have continued to do to this date. See *National Labor Relations Board* v. *District 50, United Mine Workers*, Oct. Term 1957, No. 64, 26 U. S. Law Week 4129; *American Newspaper Publishers Association* v. *National Labor Relations Board*, 345 U. S. 100.

The Court was moved, as it said, by a Congressional finding that Communists called political strikes, by the small number of persons it believed to be affected, and by the responsibility which the unions were deemed clothed with by reason of the special advantages given to them by the National Labor Relations Act. This is indicated by the following sections of Chief Justice Vinson's opinion:

> * * * "The loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union. But power is never without responsibility. And when authority derives in part from government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by government itself. [Citing cases]
>
> "We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become government agencies or may be regulated as such. But it is plain that when Congress clothed the bargaining representative "with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents' the public interest in the good faith exercise of that power is very great." 339 U. S. 382, 401-402.

The Government would read *Douds* as supporting the proposition that any sanctions imposed upon Communists are lawful. But this Court, on the contrary, although upholding the particular sanction there imposed because of the special circumstances involved, was careful to note that "political affiliations and beliefs * * * are circumstances ordinarily irrelevant to permissible subjects of government action" (p. 391). Moreover, *Douds* dealt with a congressional mandate based upon Congressional findings, and the Court repeatedly noted that its holding was rendered in deference to the legislative judgment (see pp. 388-389, 391, 393, 400-401, 404, 406).

There is nothing in the legislative history of 8 U. S. C. § 1185 which would suggest a congressional conclusion

(1) that members of the Communist Party, past or present, or of organizations on the Attorney General's list, past or present, should be denied the right to travel, or (2) that this extraordinary means of implementing the statute, namely, an affidavit as to political associations, was authorized by the Congress.

Surely the Congressional standards and procedures of the Internal Security Act, and the quasi-judicial procedures imposed in *Dulles* v. *Nathan*, 225 F. 2d 29, are "reasonable and adequate alternatives" to the Secretary's Regulations. See *Dean Milk Co. v. City of Madison*, 340 U. S. 349, 354.

By the Government's own claims, the statutes of 1918 and 1941 were directed not at matters of Communist association but at the far more serious problem of espionage and sabotage. We do not concede that Congress could have required, as it has *not* either in the Internal Security Act of 1950 or in 8 U. S. C. § 1185 a non-Communist affidavit from the would-be traveller. But there is a constitutional difference between what Congress may demand and what a subordinate official may demand. This Court's recent decisions emphasize its principal concern, namely, has Congress authorized this intrusion into rights protected by the First Amendment. *Watkins* v. *United States*, 354 U. S. 178; *Cole* v. *Young*, 351 U. S. 536; *United States* v. *Minker*, 350 U. S. 179; and *United States* v. *Witkovich*, 353 U. S. 194. In each of these cases, involving different aspects of the problem, this Court has made it clear that it will require an unambiguous mandate from Congress before either Congressional committees, the President, or administrative officials can require answers to questions of this kind or impose sanctions for such conduct.

The reasonableness of this limitation stems, in the first instance, from the deference which the Court will give to a coordinate branch of the Government, a deference to which an administrative official is not entitled. There is another reason, namely, that the limitations imposed by a statute

are usually not to be found in administrative behavior. Thus, *e.g.*, while Section 9(h) of the National Labor Relations Act requires an affidavit only as to *present* Communist Party membership—thus permitting the union officer to resign from the Communist Party and retain his official union position—the Secretary of State requires an affidavit as to past Communist Party membership. Secondly, he is interested in a panoply of activities other than the Communist Party membership which we need not again discuss; and thirdly, he not only wants the facts but he seeks to probe by asking for explanations, justifications and proof.[24] Hence, the requirement that the citizen desiring to travel "submit any evidence of anything that you have done which has been opposite to the Communist Party line" (R. 62).

The attempted examination of petitioners (R. 34-64, 127-150) is similar to that so critically analyzed by this Court in *Schneider* v. *State of N. J.*, 308 U. S. 147, 163-4:

> "* * * The applicant must submit to that officer's judgment evidence as to his good character and as to the absence of fraud in the 'project' he proposes to promote or the literature he intends to distribute, and must undergo a burdensome and inquisitorial 'examination, including photographing and finger-printing. In the end, his liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion."

Nor is there any merit in the Government's suggestion that the affidavit requirement may be sustained as merely a request for information (Br. 86-89). The Regulations (§ 51.142) unequivocally provide that if the affidavit is affirmative as to present membership, a passport will be denied. Accordingly, the Government's discussion on the hypothesis that membership alone is not a ground for de-

[24] *Cf.* the practice under the National Labor Relations Act, whereby the Board is bound by the non-Communist affidavit. *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145.

nial of a passport is entirely misplaced. Moreover, it is clear both from the regulations and the allegations made against the petitioners that Communist Party membership is the ultimate in ineligibility for travel abroad, and that there is and can be no more disqualifying characteristic. As pointed out in our main brief (p. 41), such a disqualification on the basis of Communist Party membership without more is invalid because of its disregard of the requirement of *scienter*. The Government has nowhere responded to this argument.

Conclusion

The Government's lengthy brief fails to disclose a statute which authorizes the drastic measure here under review: the administrative prohibition of an American citizen's travel for lawful professional purposes by reason of his lawful associations, writings and opinions. Whether Congress could constitutionally accomplish the same objective is most doubtful but need not be decided here.

Respectfully submitted,

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No. 481

In the Supreme Court of the United States

OCTOBER TERM, 1957

ROCKWELL KENT AND WALTER BRIEHL, PETITIONERS

v.

JOHN FOSTER DULLES, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

J. LEE RANKIN,
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MEMORANDUM FOR THE RESPONDENT

Petitioners seek review of decisions of the Court of Appeals for the District of Columbia Circuit, sitting *en banc,* holding that the Secretary of State is validly authorized, during time of war or national emergency, to deny passports on grounds to which present or past Communist Party membership may be relevant, and that he may therefore refuse to process the passport applications of persons who refuse to comply with a request for an affidavit inquiring into such membership.

In our view, these decisions are clearly correct. Nevertheless, in the light of the continuing importance of the issues presented and of the diversity of views

on particular aspects of these questions expressed in the courts below, the respondent does not oppose the granting of the writ of certiorari so that an authoritative ruling may be made by this Court.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

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BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 481

ROCKWELL KENT AND WALTER BRIEHL, PETITIONERS

v.

JOHN FOSTER DULLES, SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The unreported oral opinion of the United States District Court for the District of Columbia in the *Kent* case appears at pp. 84 and 169–170 of the Record. The unreported order of the District Court in the *Briehl* case (R. 170) was entered without opinion, other than an oral reference to the ruling in the *Kent* case (R. 168–169). The opinions of the Court of Appeals for the District of Columbia Circuit, sitting *en banc*, in the *Kent* case (R. 87–90) and in the *Briehl* case (R. 241–246), are reported at 248 F. 2d 600 and 248 F. 2d 561, respectively.

JURISDICTION

The judgments of the Court of Appeals (R. 91–94, 247–250) were entered on June 27, 1957. The peti-

tion for a writ of certiorari was filed on September 18, 1957, and was granted on November 25, 1957 (R. 253). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The Department of State has declined to continue processing petitioners' passport applications because each petitioner has refused to file, as a part of his application, a statement with respect to present or past membership in the Communist Party, as required by the regulations. An act of Congress now in force (8 U. S. C. 1185) makes it unlawful for a citizen to depart from the United States in time of war or proclaimed national emergency without a valid passport. The following questions are presented:

1. Whether 8 U. S. C. 1185 authorizes the Secretary of State to restrict foreign travel of citizens during the present proclaimed emergency by refusing, in the exercise of his discretion, to issue passports on grounds to which present and near-past Communist membership are relevant.

2. Whether the Constitution (a) forbids the denial of passports and the resulting restriction of foreign travel, on grounds to which present and near-past Communist Party membership are relevant, in the manner contemplated by Congress and as implemented by the Secretary of State, or (b) prohibits inquiry into present and near-past Communist Party membership as a part of a passport application.

STATUTES, PROCLAMATIONS, EXECUTIVE ORDERS, AND REGULATIONS INVOLVED

The pertinent portions of Titles 8, 22, and 50 of the United States Code; of Presidential Proclamations No. 2914 of December 16, 1950, and No. 3004 of January 17, 1953; of Executive Order No. 7856 of March 31, 1938; and of the regulations of the Secretary of State relating to passports are printed in Appendix A, *infra*, pp. 102–116.

STATEMENT

In these actions, petitioners Kent and Briehl seek judgments declaring that they are entitled to passports, that the passport regulations of the Secretary of State are in violation of the applicable statutes and the Constitution, and that the Secretary's refusals to issue a passport to Kent and to renew Briehl's expired passport constitute violations of petitioners' statutory and constitutional rights. Petitioners further seek orders enjoining the Secretary from continuing to deny passports to petitioners and directing that he issue a passport to Kent and renew Briehl's passport (R. 4, 103). The courts below have rejected these claims.

1. THE STATUTES AND REGULATIONS

The administrative actions which petitioners attack were taken pursuant to the statutes relating to passports and to travel, and the passport regulations issued by the respondent. These statutes and regulations provide as follows:

Section 215 of the Immigration and Nationality Act of 1952, c. 477, 66 Stat. 163, 190, 8 U. S. C. 1185

(App., *infra*, pp. 102–103), authorizes the President, in time of war or national emergency proclaimed by him, to invoke statutory restrictions making it unlawful, "except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, * * * for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport". The present state of emergency was proclaimed on December 16, 1950, by Presidential Proclamation No. 2914,[1] and the statutory travel restrictions were invoked on January 17, 1953, by Presidential Proclamation No. 3004.[2]

Title 22 of the United States Code provides that "[t]he Secretary of State may grant and issue passports * * *"[3] to persons, whether citizens or not, who owe allegiance to the United States.[4] Under the statute no applicant may be issued a passport until he has signed and submitted "a written application duly verified by his oath * * * contain[ing] a true recital of

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[1] 64 Stat. A454, App., *infra*, pp. 104–105.

[2] 67 Stat. C31, App., *infra*, pp. 105–108.

[3] 22 U. S. C. 211a, 44 Stat. 887; App., *infra*, p. 109.

[4] 22 U. S. C. 212, 32 Stat. 386; App., *infra*, p. 109. For convenience, we refer throughout this brief to persons eligible to apply for United States passports as "citizens". The original statutory limitation precluding the issuance of passports to persons other than "citizens" (11 Stat. 60) was changed in 1902 to provide, as today, that "No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States" (c. 1088, 32 Stat. 386). The purpose was to permit the issuance of passports to the new class of non-citizen nationals created by the recent acquisition of insular possessions. 35 Cong. Rec. 5697–5699, 6588–6589.

each and every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of any such passport".[5]

Regulations promulgated by the President provide that any affidavit which may be required by regulation in support of a passport application is to "be considered as, and become, a part of the application".[6] In addition, these regulations authorize the Secretary of State "in his discretion to refuse to issue a passport * * *"[7] and to make additional regulations relating to passports.[8]

The passport regulations issued by the Secretary of State, pursuant to this authority, preclude the granting of unrestricted passports to, *inter alia,* present members of the Communist Party,[9] and provide that at any stage in the administrative consideration of a passport application, "if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings".[10]

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[5] 22 U. S. C. 213, 40 Stat. 227, App., *infra*, p. 109; see also 22 CFR, 51.14, App., *infra*, p. 110.

[6] Executive Order No. 7856, Section 123, 3 F. R. 799, 805, 22 CFR, 51.74, App., *infra*, p. 110.

[7] Executive Order No. 7856, Section 124, 3 F. R. 799, 805, 22 CFR, 51.75, App., *infra*, p. 110.

[8] Executive Order No. 7856, Section 126, 3 F. R. 799, 806, 22 CFR, 51.77, App., *infra*, p. 110.

[9] 22 CFR, 1956 Supp., 51.135, App., *infra*, pp. 112–113.

[10] 22 CFR, 1956 Supp., 51.142, App., *infra*, p. 115.

2. THE ADMINISTRATIVE PROCEEDINGS AND THE PROCEEDINGS IN THE DISTRICT COURT

(*a*) *Rockwell Kent.*—(*1*) Rockwell Kent, an artist, filed an application for a passport with the Department of State on June 1, 1955, stating that the purpose of his desired travel was to visit England and to attend a meeting of the World Council of Peace in Helsinki, Finland (R. 11, 76). The Director of the Passport Office informed Kent (R. 22–28) that the Department was "obliged to disapprove your request tentatively on the ground that the granting of such passport facilities is precluded under the provisions of Section 51.135" of the regulations (*i. e.*, the regulation relating to Communist Party members) (R. 22), stating that "it has been alleged that you were a Communist" (R. 23). The Director added that Kent's case was also deemed to fall within the scope of subsections (b) and (c) of Section 51.135 (App., *infra*, p. 113) since the evidence indicated that Kent had maintained "a consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line for an extended period of time" (R. 23; see also 22 CFR, 1956 Supp., 51.141 (b), App., *infra*, p. 115). The letter set forth at length and in specific detail Kent's numerous organizational affiliations, activities, statements, and writings upon which the Department's conclusions were based (R. 23–27). Kent was advised of his right to an informal hearing in the Passport Office under Section 51.137 of the passport regulations (App., *infra*, p. 114), but was further advised that whether or not he requested a hearing it would be

necessary for him to submit a sworn statement as to whether he was then or ever had been a Communist (R. 27).

Kent thereafter filed a new passport application stating that he desired to visit England, Ireland, France, Switzerland, Denmark, Norway, Sweden, Finland, Italy, and Czechoslovakia for business and pleasure (R. 12, 77–78). The Director informed Kent's attorney that the informal hearing procedure was still open to Kent if he wished to make any statement in explanation or denial of the earlier adverse allegations (R. 32). Kent's attorney replied that Kent had "taken the position that the Passport Office's demand for an affidavit under Section 51.142 of the regulations [relating to an oath or affirmation as to Communist Party membership] is unlawful and that for that reason and as a matter of conscience, he will not respond to such a demand" (R. 33).

On November 8, 1955, Kent appeared with counsel for an informal hearing in the Passport Office (R. 34–64). In the course of the hearing, the Department put certain evidence in the record (R. 36–38, 40–43, 51, 53, 56), principally a copy of Kent's autobiography, *It's Me O Lord,* portions of which were read into the record (R. 46, 48–51) after Kent acknowledged that everything in the book was accurate (R. 44–47). Kent "refus[ed] to consider the allegations in the letter" (R. 47) previously sent to him by the Department, taking the position that as an American citizen he was entitled to a passport, and that consequently any matters unrelated to the question of citizenship were irrelevant to the Department's con-

sideration of his application (R. 44–48, 55–57, 61–63). Kent was again asked at the hearing to submit a sworn statement relative to membership in the Communist Party, in accordance with the regulations; he again refused to comply with this request (R. 57–59, 62–63).

Accordingly, the Director informed Kent by letter that the Department would give no further consideration to his application until such time as he was willing to comply with the passport regulations (R. 72–73).

(2) Kent filed his complaint in the District Court on December 14, 1955 (R. 2–4). In support of a motion for judgment on the pleadings or in the alternative for summary judgment, the Secretary of State filed an affidavit of the Director of the Passport Office, Miss Frances Knight (R. 76–84), relating to the foregoing facts and stating that Miss Knight deemed it necessary to require an affidavit from Kent "because of information set forth in (*a*) government publications, news reports and other public sources; (*b*) records of the Department of State and confidential reports from its officers in foreign countries; and (*c*) confidential reports from another agency of the Government * * *" (R. 79). Miss Knight's affidavit recited a detailed summary of the information from public sources (R. 79–83), including evidence that Kent had been a consistent supporter of at least 85 Communist-associated organizations, according to Congressional Committee reports, among them 23 organizations cited by the Attorney General as "Communist" (R. 79). Miss Knight listed the names of these or-

ganizations and of others, together with Kent's connections with the organizations and the offices held by him therein (R. 79–80). Miss Knight further quoted from public testimony of former Communist Party members, one of whom, Benjamin Gitlow, a former vice-presidential candidate on the Communist Party ticket, testified that Kent was a Communist, and another of whom, Maurice Malkin, had testified that if Kent was not a Communist Party member he was "very close to them" (R. 81). The affidavit also set forth the information obtained from the records of the Department of State and from reports from its diplomatic and consular officers abroad (R. 83–84), and concluded by stating that "[c]onfidential reports from another agency of the Government show *inter alia*, that plaintiff often attended special Communist Party meetings in Chicago, Illinois" (R. 84).

The District Court ruled that the passport regulations were valid (R. 84), granted summary judgment for respondent, denied Kent's motions for summary judgment and for a preliminary injunction, and dismissed the complaint (R. 85).

(*b*) *Walter Briehl.*—(*1*) Dr. Walter Briehl, a psychiatrist, was issued in 1953 a passport (R. 163) which expired in May 1955; and in April 1955 he filed a renewal application (R. 109–110, 163). The Director of the Passport Office informed Briehl that his request was being considered under the provisions of the passport regulations relating to affiliations with the Communist movement, stating that "it would be helpful to the Department if you would furnish an

affidavit setting forth whether you are now or ever have been a Communist, and explain your connections with" certain named organizations (R. 117–118).

Replying to this letter, Briehl's attorney stated that his client refused to submit the affidavit requested, stating that "[y]our demands and the vague and formless standards of the passport regulations under which you purport to act are palpable violations of [Briehl's] Constitutional rights, including, but not limited to, the First, Fifth, Ninth and Tenth Amendments" (R. 118). The Director then sent Briehl a letter tentatively disapproving his application on the ground that such renewal was precluded under the provisions of Section 51.135 of the regulations (relating to persons supporting the Communist movement), and informing him of the reasons for the disapproval "insofar as the security regulations will permit" (R. 120). After stating that it has been alleged that Briehl was a Communist, the Director set forth in greater detail the allegations previously communicated (R. 120–121), advising Briehl that he might present his case informally to the Passport Office and informing him that, whether or not he requested a hearing, it would be necessary for him to submit a sworn statement as to whether he was then or had been a Communist (R. 121).

Briehl's attorney replied that Briehl did not choose to offer any evidence in support of his application "unless and until" he was confronted with the persons who had furnished the adverse allegations (R. 122–123); but he thereafter requested a hearing (R. 125–126). An informal hearing was held in the Pass-

port Office on August 30, 1955, for the purpose of affording Briehl an opportunity to explain or deny the allegations (R. 127–150). Briehl appeared with counsel and took the position that the subject matter of the allegations was irrelevant to the Department's consideration of his passport application, and also that he was under no obligation to reply to these allegations by way of affirmation or denial until he had been confronted with the evidence and witnesses upon which the allegations were based (R. 131–138). His attorney raised three objections: (1) "political affiliations" are irrelevant to Briehl's "right to practice medicine" and to travel abroad in the pursuit of that practice (R. 132); (2) "every American citizen has the right to travel regardless of politics" (R. 133–134); and (3) the Department of State must "confront us with the evidence against Dr. Briehl" (R. 134), it being "the Department's job to prove not only the facts with respect to each of these allegations but * * * to prove wherein each of these activities was wrong and wherein the activities were in violation of the laws of the United States" (R. 137). Briehl was again asked to submit an affidavit with respect to his present or past membership in the Communist Party as required by the regulations; he again refused to comply with his request (R. 141–147).

Following the hearing, the counsel for the Board of Passport Appeals stated in reply to inquiries by Briehl's attorney that it was his understanding that Briehl had appeared at the hearing in the Passport Office and had refused to execute the requested affidavit; that the Board had not been advised of any

further processing of Briehl's case within the Passport Office; and that in such circumstances the Board of Passport Appeals could not, under the regulations, entertain an appeal at that time (R. 158–159). On September 16, 1955, the Director of the Passport Office notified Briehl's attorney that, in view of Briehl's refusal to explain or deny the allegations concerning him and in view of his refusal to submit the required affidavit, the Department knew of no further action which it could appropriately take in his case (R. 159–160). In reply to further inquiries by Briehl's attorney, the counsel for the Board of Passport Appeals advised that the Board was established under Section 51.139 of the passport regulations to act on appeals from decisions adverse to passport applicants, and that the Board was unaware of any such adverse decision in Briehl's case (R. 162).

(2) Briehl filed his complaint in the District Court on November 16, 1955 (R. 100–103). The respondent filed an affidavit of the Director of the Passport Office, Miss Knight, in support of the Government's cross-motion for summary judgment (R. 163–168), setting forth the foregoing facts and stating that an affidavit from Briehl was still deemed necessary because of information "contained in reports of a confidential character furnished the Department by another agency of the Government indicating the following concerning" Briehl (R. 165–166):

> He was in 1945 a member of the Los Angeles County Communist Party; he held Communist Party meetings in 1950 in his medical offices; he contributed in 1936 and 1941 articles to the

publication "Social Work Today", which has been characterized as a Communist publication; and he contributed $1,000 in 1949 to the Civil Rights Congress Bail Fund to be used in raising bail on behalf of the convicted Communist leaders in New York City. In addition, these reports indicate that as of May, 1951, he was a member of the Hollywood Arts, Sciences and Professions Council, the Southern California Chapter of the National Council of Arts, Sciences and Professions, an organization cited by the Attorney General as Communist; that he had contact with the American Committee for the Protection of the Foreign Born, an organization cited by the Attorney General as Communist; and that he attended in 1945, while an officer in the Army, meetings of the Bookshop Association, St. Louis, Missouri, which is reported to have been dominated by the Communist Party in the St. Louis area.

The District Court was of the view that Briehl's case was indistinguishable from Kent's and ruled as it had in that case (R. 169–170; see *supra*, p. 9).

3. THE OPINIONS IN THE COURT OF APPEALS

The Court of Appeals, after hearing argument on the two cases before a three-judge panel, reset the cases for argument *en banc* and affirmed the judgments of the District Court. There was no opinion of the court as such, the eight judges rendering five separate opinions in the *Briehl* case and reaffirming their views in the *Kent* case. Five judges voted to affirm, one to remand for further consideration by the Secretary, and two judges voted to reverse (R. 172). The opinions in *Briehl* were as follows:

(a) Judge Prettyman, joined by Judges Miller, Danaher and Bastian, was of the view that "the critical problem in the case * * * is * * * whether the Secretary of State may decline to issue a passport to a person who refuses to admit or deny that he is a member of the Communist Party * * * [o]r to state the problem in different terms, it is whether membership in or adherence to the Communist Party is a valid subject of inquiry prerequisite to the issuance of a passport under world conditions" (R. 198). Judge Prettyman answered these questions in the affirmative, ruling that the Secretary of State's "long-recognized power to refuse a passport" (R. 188) under the "broad discretion declared in" 22 U. S. C. 211a (R. 186) had been validly utilized by Congress in enacting the travel control provisions of 8 U. S. C. 1185 (R. 185–188). He held that these two statutes, buttressed by the war power and the combined Executive and Congressional powers in the field of foreign affairs, and considered in the light of the nature of the Communist movement and of world conditions, validated the Secretary's substantive regulations relating to Communist affiliations (R. 176–193). While recognizing that the restrictions impinged upon the "right to travel" and "indirectly upon the exercise of First Amendment rights" (R. 192), he concluded that, "balancing private right against public requirement * * * the reasonable requirements of national security * * * and the delicate characteristics of foreign relations outweigh the needs or desires of an individual to travel, when the Secretary finds the facts to be such as to preclude grant of a passport

under the regulation" (R. 192). Judge Prettyman's opinion upheld the affidavit requirement as implementing a valid inquiry into matters pertinent to the Secretary's ultimate decision (R. 195), and ruled that Briehl had no right to a hearing or decision on the merits until the requested information was furnished (R. 193–195). The opinion further held that the possible use of confidential information in reaching an ultimate decision on the merits did not render the prescribed administrative procedures void or obviate the necessity for compliance with their provisions (R. 195–198).

(*b*) Judge Washington, concurring in the result, agreed that the Secretary could validly require the affidavit "as a condition precedent to the rendering of a final decision" (R. 199), since such an affidavit requirement is normally valid if the information sought "is relevant to the exercise of a valid power" (*ibid.*). He agreed that, in enacting 8 U. S. C. 1185, Congress intended to authorize the Secretary of State to use his discretionary passport powers to control the travel of citizens in the national interest, and in particular (under the Internal Security Act of 1950) to authorize and require restriction of the travel of adherents to the Communist movement (R. 199–201). He further agreed that the Secretary has power to deny passports on grounds to which past or present Communist Party membership "may prove relevant" (R. 201) and therefore to require information on this subject as a part of the application (R. 201–203). Relying upon *Konigsberg* v. *State Bar*, 353 U. S. 252, he held that the Secretary need not decide the merits

of the application of one who refuses to furnish such information where, as here, the regulations clearly indicate the results of such a refusal. Since the court was not faced with an actual denial based upon an admission of present Communist Party membership, Judge Washington declined to pass upon the questions which would be raised by such a denial or upon the other issues discussed in Judge Prettyman's opinion.

(c) Judge Fahy, although dissenting, agreed that 8 U. S. C. 1185 delegated authority to control the travel of persons eligible to apply for passports—an authority which was valid when exercised consistently with due process in order to prevent the likelihood of harm to the national defense or the conduct of foreign affairs (R. 241–243). He further agreed that "[t]he information sought by the regulation is relevant to" a valid ground for passport denial (R. 243–244). But he read the facts as constituting "an actual denial of [the] application on the ground" of refusal to submit the affidavit, flowing "from the regulation and not from an independent conclusion of the Secretary * * *" (R. 243). It would not be reasonable, he said, and therefore not consistent with due process, for the Secretary to continue to withhold a passport in peacetime on the sole ground of refusal to furnish information, without more (R. 244–246). He would therefore have reversed and remanded, with directions to return the case to the Secretary for determinations as to whether or not the petitioner fell within one of the substantive categories for denial and whether or not his "travel would be reasonably likely

to be detrimental to the national defense or to the conduct of our foreign relations" (R. 245–246), determinations which could take into consideration the refusal to furnish information (R. 245).

(*d*) Judge Bazelon, in a dissenting opinion (R. 204–240) concurred in by Chief Judge Edgerton, disagreed with the majority on the threshold issue of the Secretary's substantive authority to restrict the travel of citizens through the exercise of his passport powers. He summarized his conclusions as follows (R. 239):

> * * * (1) [T]he President has not delegated to the Secretary of State the power to decide which Americans may travel and which may not; (2) neither of the two statutes relied on by the Secretary as a source of such power—22 U. S. C. § 211a and 8 U. S. C. § 1185—grants the power, in terms, either to the President or to the Secretary; (3) a construction of either or both of the statutes as granting the power would conflict with other expressions of congressional policy and would raise constitutional doubts of the utmost gravity, especially to the extent that eligibility is made to depend upon matters of political belief and association; (4) since the power was not conferred by statute, the President does not possess it, for it is not one of the powers inherent in his office.

(*e*) Chief Judge Edgerton, in a separate dissenting opinion (R. 240–241), agreed with Judge Bazelon but added that "the Secretary should be directed to issue a passport" (R. 240).

SUMMARY OF ARGUMENT

I

A. The passport has been recognized for well over a century as an essentially "political document" issued by the Secretary of State, in his discretion, as an aspect of his duties as chief officer under the President in the field of foreign affairs. Although passports were originally issued by the Secretary without congressional authorization or control, Congress enacted a passport statute in 1856 which recognized the Secretary's existing powers and practice and made it unlawful for others to issue passports. This statute, in force today as reenacted and amended, provides that "[t]he Secretary of State may grant and issue passports" under Presidential regulation (22 U. S. C. 211a). For decades the statute has been universally interpreted by all branches of the Government as lending congressional sanction to the Secretary's discretionary power to deny passports to certain citizens. For example, at least since 1907 the passport regulations of the President have provided that the Secretary may refuse to issue passports in his discretion. In its reenactments of the statute, Congress has presumably accepted this interpretation of the statute, as have all the judicial decisions on the subject. In *Perkins* v. *Elg*, 307 U. S. 325, 350, this Court definitively recognized "the Secretary's discretion with respect to the issue of a passport" to a citizen.

As an adjunct of this substantive power and by Presidential delegation of rulemaking authority, the Secretary has validly issued regulations defining categories of citizens to whom passports will be denied

and requiring information from passport applicants relevant to these categories.

B. The long-recognized passport discretion of the Secretary has been utilized by Congress since 1815 as the vehicle to effectuate control of the travel of citizens abroad, in the interest of national security during emergency periods. Section 215 of the Immigration and Nationality Act of 1952, c. 447, 66 Stat. 163, 190 (8 U. S. C. 1185), makes it unlawful for a citizen to depart from or enter the United States, in time of war or proclaimed national emergency, "unless he bears a valid passport". The statute is virtually identical to statutes passed during the War of 1812 and World War I. The latter statute remained on the books during the period between the wars and was amended in 1941 to make it subject to invocation during the then-existing pre-Pearl Harbor emergency, as well as during wartime. The reenactment in 1952 made the statute subject to invocation during any proclaimed emergency. On its face, the statute can only be read as authorizing the Secretary of State to exercise his traditional passport discretion so as to control the departure and entry of individual citizens; any other reading renders the statute completely meaningless. Moreover, both the legislative history of the 1918 and 1941 enactments, and the administrative practice, make it plain that Congress intended to authorize the denial of passports to individual citizens in order to control their travel in the interest of the national defense and foreign policy in time of emergency.

C. The restrictions on travel contained in this statute are now in effect pursuant to the Presidential proclamation of a state of emergency, based upon the threat of "world conquest by communist imperialism", in 1950, and the Presidential invocation of the statutory restrictions, based upon "the exigencies of the international situation and of the national defense", in 1953.

D. The regulations of the Secretary of State denying passports on grounds of Communist Party membership or activity are designed to "promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement" (22 CFR, 1956 Supp., 51.135). This aim is clearly within the limitations of the statutory delegation of emergency travel control authority. In issuing the regulation in 1952, the Secretary was motivated by the long history of passport abuse in furtherance of the aims of the Soviet Union by adherents of the Communist movement, both before World War II (see, *e. g., Browder* v. *United States,* 312 U. S. 335; *Warszower* v. *United States,* 312 U. S. 342) and thereafter; by judicial and legislative findings on the nature and purposes of the world Communist movement indicative of the purposes for which Communists may well use the right to travel abroad; and by a specific congressional finding in 1950 that "travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of

activities to further the purposes of the Communist movement" (64 Stat. 988). The Secretary's policy of controlling the travel of Communists has found support from competent observers both within and without the Government—including observers who have been critical of some aspects of the administration of that policy. Such control is plainly a reasonable means of combatting the various aspects of Communist subversion, espionage, and other activities detrimental to this nation's safety, in the context of the world situation and of the obvious value which Communists place upon travel and passports in the furtherance of their aims. The policy is not, as petitioners argue, in conflict with congressional will as expressed in the Internal Security Act of 1950; to the contrary, it implements that will.

E. Clearly, the Secretary of State, having the substantive authority we have just outlined, may require a passport applicant to submit an affidavit with respect to present or near-past Communist Party membership, whether or not present membership is alone a sufficient basis for denial of an application. 22 U. S. C. 213 prohibits the issuance of a passport until the applicant has submitted an application containing all the factual information required by the statutes and regulations, and the regulations require, if deemed necessary, the submission "as a part of his application" of a statement "with respect to present or past membership in the Communist Party" (22 CFR, 1956 Supp., 51.142). Since petitioners have not submitted the affidavit "deemed necessary" in their cases, their applications are incomplete and no

passport may issue. This affidavit requirement is subject to none of the infirmities claimed by petitioners. As is the case with application forms in innumerable other areas in which the exercise of a right or privilege is subject to reasonable regulation through a license or permit requirement, the affidavit here is merely a factual inquiry into matters relevant to a valid ground for denial. The inquiry is into conduct, not beliefs; it "is intended to prevent future action rather than to punish past action". *American Communications Ass'n.* v. *Douds,* 339 U. S. 382, 414. The affidavit is not a set form requiring the applicant to deny certain past conduct or be denied a passport. For these reasons, the affidavit contains none of the aspects of an *ex post facto* law, of a bill of attainder or of a "test oath" which petitioners seek to attach to it. Nor is the inquiry invalid even if present Communist Party membership is merely a relevant and not a decisive factor in determining eligibility for a passport. If membership is relevant, inquiry may be made; and if, after clear warning that no decision upon the application will be made until the inquiry is answered, the information is still withheld, it is lawful to terminate the administrative processing of the application. Cf. *Konigsberg* v. *State Bar,* 353 U. S. 252.

II

The denial of passports for foreign travel on grounds related to present or near-past Communist Party membership is not subject to constitutional objections.

A. The Constitution is no barrier to the congressional imposition of reasonable restrictions upon the travel of citizens, as this Court has recognized. *Blackmer* v. *United States*, 284 U. S. 421.

B. Here, Congress has delegated this power in a statute (8 U. S. C. 1185) invoking the war power and using as the control device the passport authority of the Secretary of State, which derives from the foreign affairs power. In view of the nature of these two powers, the requirements of the situation which Congress intended to remedy, and the long history of virtually identical enactments, the statute is not void for lack of adequate standards. Indeed, the Court has already upheld the statute as it applies to aliens against just such an attack. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537.

C. Finally, the First Amendment rights of petitioners would not be violated if the Secretary were to consider Communist Party membership in denying them passports and thereby restricting their travel. Even if the purported purpose of travel is innocent, it is not unreasonable to assume, in the present perilous time, that an applicant who is in fact an adherent of a foreign movement basically hostile to this country may use his travel in furtherance of that movement's objectives; and this reasonable assumption makes reasonable the restriction of such a person's travel. First Amendment rights are, of course, subject to reasonable infringement where they conflict with the right of the public to be protected from evils of conduct, as this Court has often held. More specifically, the Court has held that the "evils

of conduct" springing from the activities of the Communist movement permit inquiry into and governmental action based upon Communist Party membership of labor union leaders, public employees, and aliens, as well as sustaining convictions of conspiracy to organize the Communist Party. In the light of all the circumstances, the First Amendment does not require that the Secretary of State blind himself to Communist Party membership in passing upon passport applications.

ARGUMENT

INTRODUCTION

The Court has before it two passport cases set for hearing, Nos. 481 and 621. We are filing separate briefs in order to avoid confusion, since No. 481 itself involves what were originally two independent cases, though raising identical issues, and No. 621 also presents important distinct issues and will be argued separately. The basic legal issues underlying the Secretary of State's present passport policies, as they are challenged in these cases, are discussed in this brief. The additional questions raised in *Dayton*, No. 621, but not present in *Kent* and *Briehl*, No. 481, will be left for discussion in our brief in No. 621.

A. The fundamental issue in this case, No. 481, is whether the Secretary of State may at this time validly decline to issue a passport on grounds to which present (or near-past) Communist Party membership may prove relevant, and may therefore require applicants such as petitioners Kent and Briehl to furnish information as to their membership. These petitioners flatly refused to supply that information, and

accordingly passports have been withheld under the Secretary's regulations. They are therefore not free to travel beyond the Western Hemisphere. The controversy at the bar is posed by the petitioners' claims that they are legally entitled to passports, and thus to travel, regardless of their refusal to disclose such Communist associations, as against the Government's position that, under the current statutes and regulations, the Secretary can legally decline to issue passports to petitioners until they furnish the required information. That is the problem to be decided in No. 481; no other aspects of the State Department's passport policy or practices are involved in this case.

B. Petitioners' demands for relief are not based upon a claim to a judicially enforceable right to passports, as such. Rather, they rely upon an asserted "right to travel" which is now affected by the statutory requirement of a passport as a prerequisite to lawful departure from or entry into the United States in the existing emergency. It is this statutory nexus between passports and travel abroad on which petitioners ground their challenges to the action of the Department of State in refusing to continue to process their passport applications.[11] The first point in

[11] It could be said that the action of the Department of State has not as yet actually interfered with petitioners' travel rights; that the gravamen of their complaints is a challenge to the statute prohibiting departure or entry without a passport (8 U. S. C. 1185); and that the questions petitioners raise may properly be presented only in a criminal action for a departure or attempted departure without a passport. However, the Secretary of State has never taken this position in the courts below, and we do not now assert it as a ground for affirmance.

petitioners' brief (Pet. Br. in No. 481, pp. 18–24) is devoted to their "constitutional right to travel".

On that point, there is no controversy between the parties. For, while this Court has not yet decided whether the Constitution protects the travel of citizens across the boundaries of the nation as it protects their travel across state boundaries,[12] we do not challenge, but readily accept, the existence of a general "natural" or "constitutional" right to depart from or enter the country as an aspect of the "liberty" subject to the protections of the Constitution. We fully accede to the definitive ruling of *Shachtman* v. *Dulles*, 225 F. 2d 938, 941 (C. A. D. C.)—confirmed in substance in the opinions below—that there is a "right to travel" and that restraints on that right must conform to the Fifth Amendment.[13] Our position in these cases does not deny that principle, but rather rests on the claim that what the Secretary has done here accords with both the procedural and the

[12] See Art. IV, Sec. 2, of the Constitution; *Hess* v. *Pawloski*, 274 U. S. 352; *Williams* v. *Fears*, 179 U. S. 270.

[13] The Administrator of the Bureau of Security and Consular Affairs of the Department of State, of which Bureau the Passport Office is a subdivision, has recently stated (Roderic L. O'Connor, *The State Department Defends*, The Saturday Review, January 11, 1958):

> * * * The Department recognizes that [passport] denials can be, in practice, a limitation upon any "natural" right the citizen may have to travel.
>
> However, we believe that any such right, like all other rights, is subject to reasonable limitation in the national interest. We recognize that passport facilities can only be denied with scrupulous regard to the requirements of due process of law. * * * We believe that our present procedures meet this test.

substantive aspects of due process of law. *Shachtman* holds that the right to travel is "subject to the rights of others and to reasonable regulation under law" (225 F. 2d at 941). Our argument is that the particular requirements applied to petitioners constitute just such "reasonable regulation under law". We shall discuss both the statutory aspects of that problem, and the constitutional issues which have also been mooted.

I

THE SECRETARY OF STATE IS AUTHORIZED TO EXERCISE HIS DISCRETION IN REFUSING TO ISSUE PASSPORTS, SO AS TO RESTRICT FOREIGN TRAVEL, FOR REASONS RELATING TO PRESENT OR NEAR-PAST COMMUNIST PARTY MEMBERSHIP

The first issue before the Court is a statutory one:—whether Congress has delegated to the President and (either directly or indirectly) to the Secretary of State the power to restrict the travel of individual citizens through the withholding of passports on an individual basis. The basic passport statute provides that the Secretary of State "may grant and issue passports" to citizens (22 U. S. C. 211a); the travel-control statute makes it unlawful for a citizen to depart from or enter the United States "unless he bears a valid passport" (8 U. S. C. 1185). Six of the eight judges in the Court of Appeals read the first statute as authorizing such discretion in issuing passports, and the second statute as delegating power to control the travel of individual citizens through the exercise of that discretion; they also held that the delegation was constitutional. The dissenting opinions of Judge

Bazelon and Chief Judge Edgerton, holding that the second statute could not be read as a delegation of travel-control power, is fundamentally based upon their reading of the first statute, and the Secretary's passport power as not authorizing the issuance of passports on a discretionary basis (see, *e. g.*, R. 208–210). Petitioners similarly premise their statutory arguments upon the claim that the Secretary has a mere ministerial duty to issue passports to all citizen applicants.

Our position is that of the majority below:—Congress plainly intended in the travel-control statute (now 8 U. S. C. 1185) to make use of the traditional discretionary authority of the Secretary of State, under the long-existing passport statute (22 U. S. C. 211a), to issue or to decline to issue passports; that historical power, well-known to Congress, was to be the administrative mechanism through which travel abroad was to be regulated on an individual basis in time of war or emergency. In support of this view, we show, *first*, that the Secretary has always possessed and exercised broad discretionary authority in issuing passports; *second*, that the travel-control statute was designed to use this traditional discretion, and to delegate authority to the Secretary to control foreign travel by means of his established passport power; *third*, that the Secretary is now empowered, under those statutes and pertinent Executive Orders, so to administer the travel-control statute; *fourth*, that the Secretary may properly decline, in the exercise of his discretion, to issue passports for foreign travel to persons who are members of or affiliated with the

Communist Party; and, *fifth,* that in any event it is within the Secretary's authority to require information as to present and near-past Communist Party membership from passport applicants.

A. THE SECRETARY OF STATE HAS ALWAYS POSSESSED AND EXERCISED BROAD DISCRETIONARY POWER TO GRANT OR DENY PASSPORTS

1. Passports issued by the United States have not changed their form or nature since the early days of the Republic.[14] This Court's earliest description of the passport appears in *Urtetiqui* v. *D'Arcy,* 9 Pet. 692, 699:

> * * * It is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request that the bearer of it may pass safely and freely, and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact. * * *

See 3 Moore, *International Law Digest* (1906), 856; 2 Hyde, *International Law Chiefly As Interpreted And Applied by the United States* (1945), 1188; 17 Op. A. G. 674. A passport certifies the bearer "to be entitled to such protection as the Government can give to its citizens in foreign countries" (13 Op. A. G. 89, 91 (1869).[15] Among the purposes to which a passport regularly issued may customarily be put, in addi-

[14] See Hunt, *The American Passport* (1898), 77–80.

[15] Passports are now issued in the following language:

> I, the undersigned, Secretary of State of the United States of America, hereby request all whom it may concern to permit safely and freely to pass, and in case of

tion to its use in foreign countries, is as a document establishing citizenship for purposes of reentry into the United States, even in times when the passport itself is not a prerequisite to lawful entry. *Browder* v. *United States*, 312 U. S. 335; *Warszower* v. *United States*, 312 U. S. 342. While as a practical matter the passport may be considered the personal property of the person to whom it is issued, the Government has always asserted a paramount right to require its surrender or to cancel it for good and sufficient reasons.[16]

As the court below has earlier noted, "the issuance of passports throughout our history has been left to the judgment of the Secretary of State under Presidential regulation * * *". *Shachtman* v. *Dulles*, 225 F. 2d 938, 942. The Secretary's authority finds its origin in his executive powers as the chief officer under the President in the field of foreign affairs. From the early days of the Republic until the middle of the 19th century, the Secretary of State issued passports without any legislative authorization,[17] as recognized by

need to give all lawful aid and protection to [bearer] a citizen of the United States.

See also 3 Hackworth, *Digest of International Law* (1942), 435–436; *Communist Party of the United States* v. *Subversive Activities Control Board*, 223 F. 2d 531, 555 (C. A. D. C.), reversed on other grounds, 351 U. S. 115.

[16] 3 Hyde, 1189; 3 Hackworth, 438, 470; see also 22 CFR 51.75, App. A, *infra*, p. 110.

[17] Stuart, *Safeguarding the State Through Passport Control*, 12 Dept. of State Bull. (1945) 1066; Hunt, 77. During that period Congress had, however, enacted legislation which specifically took cognizance of the fact that the Secretary was issuing passports, one statute in 1803 making it unlawful for State Department representatives abroad knowingly to issue a

this Court in 1835 in *Urtetiqui* v. *D'Arcy*, 9 Pet. 692, 699.

During that period, however, other Federal officers, as well as State and local officials, and even notaries public, undertook to issue certificates of citizenship and documents in the nature of letters of introduction to foreign officials requesting treatment according to the usages of international law. In order to put an end to this practice, Congress in 1856 passed the statute which remains today, in only slightly modified form, the basic passport statute. The statute is now codified as follows (in pertinent part) in 22 U. S. C. 211a:[18]

> The Secretary of State may grant and issue passports * * * under such rules as the President shall designate and prescribe for and on

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passport to an alien, certifying that he is a citizen (2 Stat. 205), and another in 1815 regulating travel through passport issuance (3 Stat. 199; see the text, *infra*, at p. 44). In addition, the Senate in 1850 ratified a treaty calling for the issuance of passports to citizens going to Switzerland. 2 Malloy, *Treaties*, 1763; 1765.

[18] The original statute provided that "the Secretary of State shall be authorized to grant and issue passports * * * nor shall any passport be granted or issued to, or verified for, any other persons than citizens of the United States * * *", making it a misdemeanor for other unauthorized officials to issue passports (Section 23 of the Act of August 18, 1856, c. 127, 11 Stat. 52, 60–61). The first edition of the Revised Statutes (1874) divided this section into a number of separate sections, Section 4075 adopting the present "may grant and issue" language. Judge Bazelon's dissenting opinion notes that there is no significance in the change in language from "shall be authorized" to "may": "the effect is the same" (R. 211, note 16; see also Judge Prettyman at R. 186).

behalf of the United States, and no other person shall grant, issue, or verify such passports.

This statute served to center the passport power in the Secretary of State and to give him sole authority in this field. The Attorney General stated three years later that "[t]he impositions practiced upon the illiterate and unwary by the fabrication of worthless passports, led to the passage of the law * * *".[19] The statute thus stands as a congressional recognition, implementation, and confirmation of an existing executive authority, rather than as a new delegation of congressional power, or a limitation or expansion of powers already possessed by the Secretary.

2. In view of the source of the Secretary's power and the broad language of the basic statute, it has long been recognized that "[t]he issuance of passports is a discretionary act on the part of the Secretary of State, and he may, for reasons deemed by him to be sufficient, direct the refusal of a passport to an American citizen * * *". Hyde, 1195; see also Hackworth, 498; Moore, 919–923.[20] This discretion has been confirmed and accepted by all three branches of the Government.

(*a*) The early views of the Executive Branch were summarized in an opinion of Attorney General Knox in 1901 in answer to an inquiry from the Secretary of State as to whether it was his "duty to issue a pass-

[19] 9 Op. A. G. 350, 352 (1859); see also Borchard, *The Diplomatic Protection of Citizens Abroad* (1915), 496; Hunt, 36-42; 3 Moore, 862, *et seq.*

[20] Borchard states that "the Secretary of State is empowered by Congress to refuse, in his discretion, to issue a passport". Borchard, 364; see also pp. 494–495.

port to" a particular applicant (23 Op. A. G. 509).[21] After concluding that the applicant was in fact a citizen of the United States, the Attorney General advised that "a passport * * * may, in your discretion, be granted or withheld" (*id.* at 511; emphasis added):

> * * * The act of Congress which defines your duty in the matter of the issuance of passports expressly says "the Secretary of State may grant and issue passports." The provision, therefore, is not in terms mandatory, and I know of no law which gives to the citizen a right to a passport.
>
> Attorney-General Hoar, in an opinion dated June 12, 1869 (13 Opin., 89, 92), said:
>
> > I do not understand that the granting of passports from your Department is obligatory in any case, but is only permitted where it is not prohibited by law.
>
> * * * * *
>
> Substantial reasons exist for the use by Congress of the word "may" in connection with authority to issue passports. Circumstances are conceivable which would make it most inexpedient for the public interests for this country to grant a passport to a citizen of the United States. For example, if one of the criminal classes, *an avowed anarchist for instance,* were to make such application, the public interest might require that his application be denied.

[21] The following history of executive assertions of discretionary passport powers does not include those in times of war or emergency, which are discussed *infra*, at pp. 44–45, 49, 51–52.

The general instructions in regard to passports issued by the Department of State on May 1, 1886, included the following provision (2 Wharton, *International Law Digest* (1886), 469, 471):

> The issuing of passports is at the discretion of the Secretary (Rev. Stat., § 4075), and they will not be granted to persons engaged in violation of the laws of the United States, e. g., Mormon propagandists.

This provision was changed in the Passport Rules of 1903 to state that the Secretary would exercise "the right in his discretion to refuse to issue a passport * * * towards anyone who, he has reason to believe, desires a passport to further an unlawful or improper purpose".[22]

It appears that the 1903 rules referred to by Moore were issued by the President. In any event, the President has issued "Rules Governing the Granting and Issuing of Passports in the United States", confirming the Secretary's discretion, at least since 1907. The Rules issued by President Theodore Roosevelt on June 13, 1907, in Executive Order No. 654, provided that "No one but the Secretary of State may grant and issue passports in the United States (Revised Statutes, Sections 4075, 4078), and he is empowered to refuse them in his discretion", and further that "The Secretary of State is authorized to make regulations on the subject of issuing and granting passports additional to these rules and not inconsistent with them".[23] The substance of these provisions has

[22] 3 Moore, 902.

[23] Executive Order No. 654.

been continued in Passport Rules issued by succeeding Presidents, and is today in force under Rules promulgated by President Franklin D. Roosevelt in 1938.[24]

The Secretary's discretionary power has not only been long asserted but it has been frequently exercised in refusing to grant passports to particular citizens, since at least as early as 1819.[25] For many years, however, neither the President nor the Secretary appear to have thought it desirable to establish by regulation specific categories of citizens with respect to whom this discretion would be exercised; it was then the view of the Department that "[t]he causes of refusal to issue passports to citizens depend upon con-

[24] See Executive Order No. 2119–A, January 12, 1915 (reprinted in Borchard at 508–511); Executive Order No. 2286–A, December 17, 1915 (reprinted in *For Rel.*, 1915, Supp., 912); Executive Order No. 2362–A, April 7, 1916 (reprinted in *For. Rel.*, 1916, Supp. 787); Executive Order No. 2519–A, January 24, 1917 (reprinted in *For. Rel.*, 1917, Supp. 1, 573); Executive Order No. 4382–A, February 12, 1926 (reprinted in *Hearings Before the House Committee on Foreign Affairs on H. R. 11947* (1926), 69th Cong., 1st Sess., pp. 19–25); Executive Order No. 4800, January 31, 1928; Executive Order No. 5860, June 22, 1932; Executive Order No. 7856, March 31, 1938, 3 F. R. 799, 22 CFR 51.75 (App., *infra*, p. 110).

It is noteworthy that Executive Orders No. 2286–A, 2362–A, and 2519–A all required that applicants submit documentary evidence that it was "imperative" that they travel abroad. See *infra*, p. 45.

[25] Note, *Passports and Freedom of Travel; The Conflict of a Right and a Privilege*, 41 Geo. L. J. 63, 73, note 43. For specific instances of such refusals, see 3 Moore, 919-923; Hyde, 1195–1197; Hackworth, 498–512. The section in Hackworth is entitled "Grounds of Refusal" and contains such subheadings as "Conduct and character", "Unlawful activities", "Conviction of crime", "Paroled criminals", "Use of foreign passports", "Participation in politics [abroad]", etc.

siderations applicable to individual cases and are not the subject of general rules." [26]

(*b*) Congressional approval of this discretionary interpretation of the passport statute (and the underlying power) is to be inferred from the several reenactments of the basic 1856 Act. The 1869 opinion of Attorney General Hoar (13 Op. A. G. 89, referred to in Attorney General Knox's opinion, *supra*, p. 33) had been rendered before Congress, in 1874, changed the statutory language from "shall be authorized to grant and issue" to "may grant and issue" (Revised Statutes, Section 4075). This language was continued in the recodification of June 30, 1926 (44 Stat., Part 1, p. 657, then codified as 22 U. S. C. 211), and in the reenactment of July 3, 1926 (c. 772, 44 Stat., Part 2, p. 887; see also 44 Stat., Part 1, p. 1951; codified as 22 U. S. C. 211a). All during this time the Secretary's view of his authority was well known. In these circumstances, the repeated reenactment of the statute, "which had previously received long continued executive construction, is an adoption of such construction". *United States* v. *Hermanos y Compania*, 209 U. S. 337, 339; see also *United States* v. *Allen-Bradley Co.*, 352 U. S. 306, 308–311; *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 544–549; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 310–315; *United States* v. *G. Falk & Brother*, 204 U. S. 143, 150, 152; cf. *United States* v. *Korpan*, 354 U. S. 271, 276.

[26] *For. Rel.*, 1907, Part 2, 1082, 1083.

The executive interpretation remained unchanged after the last reenactment in 1926.[27] As we have noted (*supra*, p. 35), President Franklin D. Roosevelt again declared that "The Secretary of State is authorized in his discretion to refuse to issue a passport * * *" in Executive Order No. 7856, which is still in force (3 F. R. 799; 22 CFR 51.75, App., *infra*, p. 110). In 1941, Secretary of State Hull reasserted this discretion in a section of an order[28] which was incorporated into President Truman's Proclamation No. 3004 of January 17, 1953, which is also still in force.[29]

(*c*) It is not surprising that a power so universally recognized as wholly discretionary, and therefore essentially non-justiciable, did not receive judicial confirmation until 1923, when the Court of Appeals for the Eighth Circuit decided *Miller* v. *Sinjen*, 289 Fed. 388. There, the court held that "a finding that plaintiff had ceased to be a citizen of the United States was not necessary to the action of the State Department in denying him a passport, for the reason that the granting of a passport by the United States is, and

[27] In an opinion of August 9, 1926, the Solicitor for the Department of State commented (3 Hackworth, 467–468):

> The Department has consistently held the view that the issuance of passports is wholly within the discretion of the Secretary of State, and I know of no instance in which an effort has been made to compel the Secretary to issue a passport.

[28] Departmental Order No. 1003, November 25, 1941, Section 58.10, 6 F. R. 6069, 6070, 22 CFR 53.8; see App., *infra*, pp. 111–112.

[29] Section 1, 67 Stat. C31; see App., *infra*, pp. 105, 107.

always has been, a discretionary matter * * *. This has been the law both prior to the passage of any statute relating to the granting of passports, as well as subsequent to such statutes, now embodied in sections 4075, et seq. Revised Statutes * * *" (289 Fed. at 394–395).

In 1939, this Court, in *Perkins* v. *Elg*, 307 U. S. 325, added its own authoritative confirmation of the Secretary's discretionary power. In that case, Miss Elg had sued both the Secretary of Labor—at that time responsible for immigration and deportation matters—and the Secretary of State, complaining that, on the basis of allegedly erroneous determinations that Miss Elg was not a citizen, the former sought to deport her and the latter refused to renew her passport. The relief sought against the Secretary of State was an injunction against refusing to issue her a passport upon the ground that she was not a citizen. The Court of Appeals affirmed the District Court's entry of a decree declaring that Miss Elg was a citizen but directing that the complaint be dismissed as to the Secretary of State because of his official discretion in the issuance of passports (99 F. 2d 408 (C. A. D. C.)). This Court, while affirming on the issue of citizenship, modified the decree by striking the dismissal as to the Secretary of State so as to include him in the declaratory provision of the decree, on the following ground (307 U. S. at 349–350; emphasis added):

> * * * The dismissal was upon the ground that the court would not undertake by mandamus to compel the issuance of a passport or control by means of a declaratory judgment

> the discretion of the Secretary of State. But the Secretary of State, according to the allegation of the bill of complaint, had refused to issue a passport to Miss Elg "solely on the ground that she had lost her native born American citizenship." The court below, properly recognizing the existence of an actual controversy with the defendants (*Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227), declared Miss Elg "to be a natural born citizen of the United States," and we think that the decree should include the Secretary of State as well as the other defendants. *The decree in that sense would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship.*

The Secretary could no longer refuse to issue a passport on the ground of non-citizenship—a judicial question which had been determined in Miss Elg's favor—but he would still be free to exercise his "discretion with respect to the issue of a passport" by denying her a passport, if he deemed it necessary, on *other* grounds.[30]

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[30] This interpretation of the *Elg* decision has been consistently followed by this Court. *Arenas* v. *United States*, 322 U. S. 419; *McGrath* v. *Kristensen*, 340 U. S. 162, 169–171; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 185, note 5 (Mr. Justice Jackson, concurring: "That was an action to mandamus the Secretary of State to issue a passport, to which it was conceded Miss Elg had no legal right, its issuance being wholly within Executive discretion which the courts would not attempt to control"). See also *Gillars* v. *United States*, 182 F. 2d 962 (C. A. D. C.).

Not until 1951, when travel controls were in effect, was there a suit to compel the Secretary of State to issue a passport. *Bauer* v. *Acheson*, 106 F. Supp. 445 (D. D. C.). In that case, a three-judge District Court, while holding that the requirement of a passport to leave or enter the country subjected passport issuance to due process requirements, stated (106 F. Supp. at 451-452):

> The court recognizes that in the matter of passports the executive department of the government, acting through the Secretary of State, must necessarily be accorded wide discretion in determining when and where the protection of the United States may be extended to an American citizen travelling abroad, and that it should also have discretion to deny such protection to persons whose activities abroad might be in conflict with its foreign policy. * * *

The ensuing series of cases in the court below have all come to essentially the same conclusion, either expressly or by necessary implication.[31]

3. The Secretary of State, possessing this broad discretion, may properly provide for the orderly exercise of his passport powers by issuing regulations defining categories of citizens to whom passports will be denied, and requiring information from passport applicants.

[31] See (in addition to the present case and the decisions below in No. 621) *Communist Party of the United States* v. *Subversive Activities Control Board*, 223 F. 2d 531, 535 (specific reference to persons affiliated with the Communist movement), reversed on other grounds, 351 U. S. 115; *Dulles* v. *Nathan*, 225 F. 2d 29; *Shachtman* v. *Dulles*, 225 F. 2d 938; *Robeson* v. *Dulles*, 235 F. 2d 810, certiorari denied, 352 U. S. 895; *Boudin* v. *Dulles*, 235 F. 2d 532; *Kraus* v. *Dulles*, 235 F. 2d 840; *Stewart* v. *Dulles*, 240 F. 2d 602.

The power to "grant and issue passports" is lodged in the Secretary himself under Section 211a of Title 22, subject only to "such rules as the President shall designate and prescribe." And since the Secretary thus possesses the substantive passport power, he also has the subsidiary power to issue regulations governing its exercise, so long as such regulations do not conflict with those of the President.[32] Moreover, redelegation to the Secretary of the rule-making power vested in the President by 22 U. S. C. 211a has been in effect at least since President Theodore Roosevelt's 1907 rules (*supra*, p. 34), and is now in effect under the provisions of both Executive Order 7856 (22 CFR 51.77) and Section 1 of Proclamation No. 3004 (App., *infra*, p. 107).[33]

It follows that the Secretary—possessed as he is of both his own power under the statute and of the

[32] It may well be that Congress thought it appropriate to provide that the Secretary should act "under such rules as the President shall designate and prescribe" since Congress was granting authority to a subordinate of the President, rather than the President himself, and wished to make it clear that the subordinate's actions would, of course, be subject to the President's overriding supervision. It is not at all necessary to read the statute as placing *all* the rule-making power in the President.

[33] No problem of unlawful delegation is presented by this redelegation. The President may speak and act through his department heads, even where the authority exercised has been committed by Congress specifically to the President. Cf. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 543; *Russell Co.* v. *United States*, 261 U. S. 514; *Hegler* v. *Faulkner*, 153 U. S. 109; *Wolsey* v. *Chapman*, 101 U. S. 755; *Williams* v. *United States*, 1 How. 290; *United States* v. *Eliason*, 16 Pet. 291.

residuum of the President's power—is authorized to issue regulations establishing prescribed categories of citizens with respect to whom the Secretary's discretion shall be exercised. This he has done in Section 51.135 of the Passport Regulations,[34] the substantive regulation (here at issue) bearing on the issuance of passports to persons supporting the Communist movement. In promulgating that regulation, Secretary of State Acheson expressly invoked the delegation of rule-making power from Congress to the President (22 U. S. C. 211a) and the presidential re-delegation of that power to himself (22 CFR 51.77). See 17 F. R. 8013, 22 CFR,[35] 1956 Supp., at p. 98; App. A, *infra*, p. 112, note 1.[35]

In view of this history,[36] there is no basis for petitioner's contention, adopted in Judge Bazelón's dissent below (R. 208–210), that "for almost one hundred years the Executive construed the passport statutes as authorizing only the power to issue regulations of an administrative character" (Pet. Br. 27), and that therefore the basic passport statute (22 U. S. C. 211a) must be so construed.[37]

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[34] 22 CFR, 1956 Supp., 51.135, App., *infra*, pp. 112–113.

[35] Contrary to petitioners' contention (Pet. Br. 30–31), the citation of this authority was obviously to indicate the Secretary's *rule-making* authority—since that is the power conferred by those provisions—and not to support the substantive discretionary power which the regulations implemented. The latter authority, deriving from the aggregate of historically recognized powers which we have discussed above, required no citation.

[36] See also *infra*, p. 44ff, for further instances of the historical exercise of the passport power.

[37] Petitioners' reliance upon the testimony describing the nature of the "rules" contemplated by Section 211a as "ad-

B. THE TRAVEL CONTROL STATUTE (8 U. S. C. 1185) IS A DELEGATION OF AUTHORITY TO THE SECRETARY TO RESTRICT THE TRAVEL OF CITIZENS THROUGH PASSPORT DENIALS ON GROUNDS RELATED TO THE NATIONAL SECURITY IN TIMES OF WAR OR EMERGENCY

Section 215 of the Immigration and Nationality Act of 1952, c. 477, 66 Stat. 163, 190 (8 U. S. C. 1185)—taking the place of the similar prior statute—makes it unlawful for a citizen to depart from or enter the United States, in time of war or emergency, unless he bears a valid passport. This statute recognizes and makes deliberate use of the Secretary's traditional passport discretion, and delegates authority for its exercise so as to control the travel of individuals during emergency periods in the interest of

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ministrative rules," in *Hearings Before the House Committee on Foreign Affairs on H. R. 11947*, 69th Cong., 1st Sess. (1926) (Pet. Br. 26–27), is misplaced. The entire discussion at that hearing related to "administrative rules" and the need for keeping such rules flexible; at no point was the Secretary's traditional substantive discretion alluded to or disclaimed.

Judge Bazelon's quotation from the Secretary's brief in the court below (R. 207), in which he states that "the Secretary conceded that § 211a 'confers no substantive power' ", is subject to possible misintgrpretation. It was the Secretary's position below, as it is here, first, that Section 211a *conferred* no new substantive power whatever, but instead *confirmed* existing power in the Secretary (*supra*, p. 32); and, second, that the substantive power confirmed did not include substantive power to restrain the departure or entry of non-passport-bearing citizens, absent further legislation, but only the power to exercise discretion in issuing passports to citizens. Section 211a did, however, confer whatever "non-substantive" administrative power may have been lacking for the President, acting through the Secretary, to issue regulations respecting the exercise of his substantive powers.

Judge Bazelon's apparent acceptance of the argument that the Secretary has never had discretion to deny passports to citizens (R. 208–210) is difficult to reconcile with his later recognition of this discretion (R. 215, note 32, and R. 224).

the national security. Certainly, the statute was not intended or designed to strip the Secretary of his former discretion in issuing and denying passports. That very discretion was the vehicle chosen by Congress to effectuate travel control.

1. *Legislative history:* Congress has long felt the need to control travel in emergency periods, for it has enacted legislation to this end in times of war or great crisis since 1815.[38] In such enactments Congress has chosen the well-recognized discretionary passport power of the Secretary of State as the instrument through which such controls were to be made operative, by making it unlawful to undertake certain travel without a valid passport.

The 1815 statute (Section 10 of the Trading With the Enemy Act of 1815, 3 Stat. 199), passed just prior to the termination of the War of 1812, made it illegal for any citizen to "cross the frontier" into enemy territory "without a passport first obtained from the Secretary of State" or other specified officials. The next travel control statute did not appear until World War I, but during the Civil War the same result was accomplished without congressional sanction. Secretary of State William H. Seward issued an order prohibiting the departure from or entry into any port of the United States of any person who did not have a passport. A subsequent order pro-

[38] The House Report on the 1918 Act (see *infra*, pp. 45–48), in citing the need for legislation, states that "the Attorney General has formally ruled that neither the President nor the executive departments have power to curb the general departure and entry of travelers." H. Rept. No. 485, 65th Cong., 2d Sess., p. 2.

hibited the issuance of a passport to any citizen subject to military service, in the absence of the posting of a bond. Hunt, 49–54; 3 Moore, 1015–1021.

After the outbreak of World War I in 1914, President Wilson sought to prevent American citizens from unnecessarily placing themselves in belligerent areas by promulgating rules requiring that passport applicants submit documentary evidence sufficient to "satisfy the Department of State that it is imperative" that they go abroad.[39] There was no law, however, which prevented departure or entry without a passport. It was for this reason that Congress enacted, in 1918, the direct antecedent of the present travel control statute. Act of May 22, 1918, c. 81, 40 Stat. 559.[40]

The legislative history of the 1918 Act makes it absolutely clear that the Congress intended the Secretary of State to use his traditional passport powers to control the travel of Americans in the interest of the national security.[41] The House Foreign Affairs Committee, which added the section relating to the travel of citizens,[42] explained the bill as follows (H.

[39] See *For. Rel.*, 1915, Supp., 912; *For. Rel.*, 1916, Supp., 788; *For. Rel.*, 1917, Supp. 1, 575.

[40] Section 2 of this 1918 Act provided that after the prescribed Presidential proclamation "has been made and published and while said proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States *unless he bears a valid passport.*" (Emphasis added.)

[41] The 1918 Act provides meaningful legislative history, since the present statute is essentially a reenactment of that Act. Cf. *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 541.

[42] See 56 Cong. Rec. 6029.

ept. No. 85, 65th Cong., 2d Sess., pp. 2–3; emphasis
dded):

> The bill is intended to stop an important gap in the war legislation of the United States. * * *
>
> * * * American citizens and neutrals [are] perfectly free to come and go. No argument is necessary to indicate the probability that Germany will wherever possible employ renegade Americans or neutrals as her agents instead of employing Germans about whom suspicion would easily be excited. The danger of the transference of important military information causes the Government great anxiety, particularly as the Attorney General has formally ruled that neither the President nor the executive departments have power to curb the general departure and entry of travelers.
>
> New legislation is the only remedy. * * *
>
> * * * It will be observed that *citizens need not secure such permits as are required of aliens, but must bear valid passports. Passports will continue to be issued as at present by the Department of State,* and there is no reason to believe that any American citizen will be unduly inconvenienced by these restrictions. That some supervision of travel by American citizens is essential appeared from statements made before the committee at the hearing upon the bill. One case was mentioned of a United States citizen who recently returned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was strong suspicion that he came to the United States for no proper purpose. Nevertheless not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so. The known facts in his case

are not sufficient to warrant the institution of a criminal prosecution, and in any event the difficulty of securing legal evidence from the place of his activities in Europe may easily be imagined.

The power vested in the President is broad and comprehensive. Nevertheless the bill itself defines all the infringements of its terms which may be criminal. It is only possible for the President, by prescribing limitations and exceptions, to diminish the number of crimes or the varieties of circumstances under which a criminal act may take place. In other words, the bill places a maximum limit beyond which its penal provisions may not be carried. This, together with the assurance from past experience that no act of the President will be unreasonable or oppressive, constitutes a sufficient guaranty that the powers granted will be fairly enforced. Beyond this the bill itself requires that all rules, regulations, and orders shall be reasonable.

It is essential to meet the situation that the Executive should have wide discretion and wide authority of action. No one can foresee the different means which may be adopted by hostile nations to secure military information or spread propaganda and discontent. It is obviously impracticable to appeal to Congress for further legislation in each new emergency. Swift Executive action is the only effective counterstroke.

The committee was informed by representatives of the executive departments that the need for prompt legislation of the character suggested is most pressing. There have recently been numerous suspicious departures for Cuba

> which it was impossible to prevent. Other *individual cases* of entry and departure at various points have excited the greatest anxiety. This is particularly true in respect of the Mexican border, passage across which can not legally be restricted for many types of persons reasonably suspected of aiding Germany's purposes. * * * Your committee were also of the opinion that the bill is, and therefore reported it as, an emergency war measure.

In the debates on the floor of Congress it was recognized that "a passport can not be claimed by a citizen as a matter of right. Passports are granted only at the will of an administrative officer. No court will force that officer to grant a passport". 56 Cong. Rec. 6063. These characteristics of passports were recognized to be the fundamental premise of the statute (56 Cong. Rec. 6030):

> Mr. MOORE of Pennsylvania. Well, then, the matter is left open so that the President has discretion to say who shall or who shall not have passports?
>
> Mr. FLOOD. That is the purpose of the law.
>
> Mr. MOORE of Pennsylvania. The gentleman advances this as a war measure and puts it on that ground?
>
> Mr. FLOOD. Absolutely. It is limited to the duration of the war.

The debates further stressed that the individuals at whom the legislation was aimed were persons suspected of engaging in activities inimical to the conduct of the war, whether or not sufficient proof of such

activities existed to warrant prosecution under the statutes relating to espionage, subversion, treason, or similar crimes. See 56 Cong. Rec. 6029–6030, 6063–6067, 6191–6195, 6248.

The 1918 statute was invoked by Presidential Proclamation No. 1473 of August 8, 1918, which provided in part as follows[43] (40 Stat. 1829, 1831; emphasis added):

> 1. No citizen of the United States shall receive a passport entitling him to leave or enter the United States, unless it shall *affirmatively appear that there are adequate reasons for such departure or entry* and that such departure or entry is *not prejudicial to the interests of the United States.*

This statute was effective only in wartime, and the controls terminated on March 3, 1921.[44] In 1941, after President Roosevelt had proclaimed an unlimited national emergency,[45] Congress amended the 1918 Act to provide, *inter alia*, that the Act could be invoked during the then-existing emergency.[46] The

[43] See Executive Order No. 2932, *For. Rel.*, 1918, Supp. 2, 815, for the implementing regulation. For the history of those regulations and their operation during World War I, see Hyde, pp. 1202–1206.

[44] Public Resolution No. 64, 41 Stat. 1359, *et seq.*

[45] Proc. No. 2487, May 27, 1941, 55 Stat. 1647.

[46] The legislative history of that statute (Act of June 21, 1941, 55 Stat. 252) is the last external indication of congressional intent relating to the statute, since the provision's reenactment as Section 215 of the Immigration and Nationality Act of 1952 (Act of June 27, 1952, 66 Stat. 190), while extending its terms to embrace any proclaimed emergency, occasioned no significant comment. See note 53, *infra*, p. 52.

tinent Senate Report stated (S. Rept. No. 444, h Cong., 1st Sess., pp. 1-2):

> * * * Since the outbreak of the present war it has come to the attention of the Department of State and of other executive departments that there are many persons in and outside of the United States who are directly engaged in espionage and subversive activities in the interests of foreign governments, and others who are engaged in activities inimical to the best interests of the United States, who desire to travel from time to time between the United States and foreign countries in connection with their activities, as well as others who desire to leave the United States for the purpose of evading justice.
>
> During the last war, when it is believed a lesser number of persons were engaged in espionage and subversive activities in the United States than is now the case, notwithstanding the fact that the United States is not at war, it was found desirable to enact legislation to provide for the regulation of travel to and from the United States on the part of all persons, citizens as well as aliens. The situation existing throughout the world and the necessity of promoting as far as possible the national defense justify, it is believed, the enactment of legislation providing for the centralization of control over the entry into and departure from the United States of persons of all classes. * * * Since the Act of May 22, 1918, was the subject of considerable litigation and consequently has been construed in a number of respects by the courts of the United States, it seems particularly desir-

able that that act be amended rather than that new legislation be enacted. * * *[46a]

Again, the debates were unequivocal concerning the purpose of the bill, and the intended manner of its operation.[47]

Presidential invocation[48] of this statutory authority, and implementation by the Secretary of State,[49] fol-

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[46a] For the court decisions referred to, see note 55, *infra*, pp. 54–55.

[47] The following remarks are typical:

> Mr. BLOOM. * * * This would prevent a person, like Fritz Kuhn, or anybody else, from leaving the country if we wanted to keep him here. * * * [87 Cong. Rec. 5049].
>
> * * * * * *
>
> Mr. LUTHER A. JOHNSON. * * * The sole purpose of this legislation is to give that same power that this Government had during the World War, and have a sort of clearing house where people entering or leaving this country would have to give their reasons why they were going or coming, and where it would be determined whether they are engaged in espionage, and whether their coming in or going out would be inimical to the interests of the United States. * * * [They] would have to go to the State Department and state why they were coming in or going out and secure an entrance or exit permit. [87 Cong. Rec. 5052.]

See also 87 Cong. Rec. 5048–5053, 5386–5388.

[48] Proc. No. 2523, November 14, 1941, 55 Stat. 1696. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 at 210, note 7; *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 599–600; *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 540–541.

[49] Departmental Order No. 1003, 6 F. R. 6069. See cases cited in note 55, *infra*, pp. 54–55. These regulations, as amended by Departmental Regulation No. 11, August 27, 1945, 10 F. R. 11046, are still in effect as Part 53 of Title 22 of the Code of Federal Regulations. See App., *infra*, pp. 110–112. They were expressly ratified and confirmed in Presidential Proclamation No. 2850, August 17, 1949, 63 Stat. 1289, amending the alien provisions of the 1941 proclamation, and were incorporated by reference in Proclamation No. 3004, January 17, 1953, 67 Stat. C31 (see *infra*, p. 37).

lowed shortly.[50] Despite the termination of the emergency proclaimed in 1941 on April 28, 1952,[51] Congress continued the statutory provisions in effect until April 1, 1953.[52] *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 at 210, note 7. Meanwhile, Congress repealed the 1918 statute as amended in 1941 (66 Stat. 279) and reenacted it as Section 215 of the Immigration and Nationality Act of 1952, amending it only so as to make its provisions subject to invocation during "any national emergency proclaimed by the President * * *" (66 Stat. 190).[53]

This is the statute which is in force today. Considered in the light of the long and unequivocal history just outlined, this provision must be read as a delegation to the Secretary of State of authority to continue to exercise his discretionary passport powers so as to prevent, where necessary or appropriate, the

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[50] The history of the operations of the Passport Office during World War II is set forth in Stuart, *Safeguarding the State Through Passport Control*, 12 Dept. of State Bull. (1945) 1066.

[51] Proc. No. 2974, 66 Stat. C31.

[52] 66 Stat. 54, 57, 96, 137, 330, 333. It was during this extension period that the Secretary issued Departmental Regulation No. 108.162, effective August 28, 1952, 17 F. R. 8013, containing the regulations here complained of (22 CFR, 1956 Supp., 51.135–51.143; App., *infra*, pp. 112–116). Petitioners ignore these statutory extensions in arguing that at that time "there was no statute forbidding the departure of citizens without a passport" (Pet. Br. 30–31). This contention is, in any event, irrelevant; see *supra*, pp. 40–42.

[53] The House Report comments only that the statutory provisions "are incorporated in the bill (sec. 215) in practically the same form as they now appear in the act of May 22, 1918 (40 Stat. 559)." H. Rept. No. 1365, 82d Cong., 2d Sess., p. 53.

departure or entry of individual citizens by denying them the passports necessary to such travel. If the purpose of Congress is to be honored, the fact that the statutory restraints evoke some constitutional considerations cannot justify a reading which would nullify the traditional power of the Secretary to deny passports (in cases where the discretionary denial is based upon grounds related to the national security) and wholly frustrate the proclaimed objective of the travel control statute.

2. *Statutory terms:* Putting this significant legislative history to one side, the meaning and purpose of the travel control statute seem clear upon its face. As amended and now in force, the statute, as codified in Title 8 of the United States Code, provides as follows (in pertinent part): [54]

> § 1185. *Travel control of citizens and aliens during war or national emergency—*
> *(a) Restrictions and prohibitions on aliens.*
>
> When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise

[54] This provision is Section 215 of the Immigration and Nationality Act of 1952.

ordered by the President or the Congress, be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

(2) * * *

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

* * * * * *

(*b*) *Citizens.*

After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

After presidential invocation of these sections, it is unlawful for *aliens* to depart from or enter the United States except as provided by the President; subsection (a) (3) contemplates the issuance or non-issuance of departure and entry permits to aliens as the means of effectuating these controls.[55] As to a *citizen,* the

[55] Subsections (4)–(7) also relate to such permits. The provisions relating to aliens, which were continued in force in

statute similarly makes it unlawful to depart from or enter the United States, except as provided by the President; and in this case the statute adds *"unless he bears a valid passport"*. Thus, passports are specifically designated as the departure and entry "permits" for citizens.[55a] In short, the intended control of departure and entry[56] was to be carried out by the

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most respects after the end of World War I by the Act of March 2, 1921, 41 Stat. 1217, have been interpreted and applied in the following cases, of which those decided under the statute as amended in 1941 to apply to the then-existing emergency (55 Stat. 252; see *supra*, p. 49) are indicated: *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1941 amendment); *Kwong Hai Chew* v. *Colding*, 344 U. S. 590 (1941 amendment); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537 (1941 amendment); *United States ex rel. Vajta* v. *Watkins*, 179 F. 2d 137 (C. A. 2) (1941 amendment); *Eisler* v. *United States*, 176 F. 2d 21 (C. A. D. C.), certiorari denied, 337 U. S. 958 (1941 amendment); *United States ex rel. Costea* v. *Smith*, 46 F. 2d 229 (C. A. 7); *United States ex rel. Komlos* v. *Trudell*, 35 F. 2d 281 (C. A. 2), certiorari denied, 280 U. S. 607; *McCandless* v. *United States ex rel. Swystun*, 33 F. 2d 882 (C. A. 3), affirming 24 F. 2d 211 (E. D. Pa.); *Felich* v. *Meier*, 23 F. 2d 185 (C. A. 8); *United States ex rel. London* v. *Phelps*, 22 F. 2d 288 (C. A. 2), certiorari denied, 276 U. S. 630; *United States* v. *Karnuth*, 30 F. 2d 242 (C. A. 2), certiorari denied, 279 U. S. 850; *Johnson* v. *Keating ex rel. Tarantino*, 17 F. 2d 50 (C. A. 1); *Flora* v. *Rustad*, 8 F. 2d 335 (C. A. 8); *Throumoulopoloy* v. *United States*, 3 F. 2d 803 (C. A. 1); *Takeyo Koyama* v. *Burnett*, 8 F. 2d 940 (C. A. 9); *Sichofsky* v. *United States*, 277 Fed. 762 (C. A. 9); *Van Lacken* v. *Wixon*, 84 F. Supp. 958 (N. D. Cal.) (1941 amendment); *Ex Parte Van Lacken*, 81 F. Supp. 79 (N. D. Cal.) (1941 amendment); *United States* v. *Goldstein*, 30 F. Supp. 751 (E. D. N. Y.); *Bennedsen* v. *Nelson*, 2 F. 2d 296 (D. Minn.); *In re Wysbak*, 292 Fed. 761 (D. Mass.).

[55a] See *supra*, p. 46.

[56] The 1918 statute (40 Stat. 559) was entitled "An Act To prevent in time of war *departure from or entry into* the United States *contrary to the public safety*" (emphasis added).

denial of permits to individual aliens, and by the denial of passports to individual citizens, where the departure or entry of such persons was deemed "contrary to the public safety" in the context of the war or emergency which required the invocation of the restrictions. And with respect to citizens, this meaning becomes even clearer because Congress deliberately chose to employ the mechanism of the passport which carried with it over a century of clear administrative discretion.

Any other reading of the statute renders the provision as to travel control of citizens meaningless. If the Act does not confirm the authority of the Secretary of State to refuse to issue passports to certain applicants, as Judge Bazelon's opinion suggests (R. 211–212),[57] it does not authorize control of the depar-

[57] Judge Bazelon reads the statute as granting "the Secretary discretion * * * to determine which parts of the world can be visited by Americans only if they have passports, *but not to determine which Americans are to receive passports*" (R. 210; emphasis added). In other words, every citizen who applies must be issued a passport, thereby making it lawful for him to "depart from or enter * * * the United States"; the only discretion vested in the Secretary, he says, is to restrict the passport against use in certain "parts of the world". But this restriction would carry no sanctions, since the statute makes it unlawful only to "depart from or enter" the country *without a lawful passport*. Under Judge Bazelon's theory, the only way in which the Secretary could effectuate the stated statutory purpose of "prevent[ing] in time of war *departure from or entry into* the United States contrary to the public safety" would be to lay a blanket prohibition upon travel to *any* area of the world without a passport, directed at all citizens alike. But, as we have just seen, there would be no enforcement power to back up such a prohibition if the Secretary is under a

ture and entry of citizens at all. While the citizen intended to be restricted by the statute could not travel abroad without a passport, this disability could be cured by the mere formality of submitting a passport application which the Secretary would be powerless to deny. Since the method of individual control which has been put in force by the Secretary was plainly intended by Congress, and since the statutory language may only be read intelligently as providing such individual control through passport denials, the courts may not ignore this plain meaning of the statute merely to avoid a decision as to its validity. *Jay* v. *Boyd*, 351 U. S. 345, 357, note 21; *United States* v. *Sullivan*, 332 U. S. 689, 693; *Hopkins Federal Savings & Loan Assn.* v. *Cleary*, 296 U. S. 315, 334–335. The courts "must also avoid a construction that would seriously impair the effectiveness of the Act in coping with the problem it was designed to alleviate". *United States* v. *Harriss*, 347 U. S. 612, 623.

C. THE STATUTORY TRAVEL RESTRICTIONS ARE NOW IN EFFECT

On December 16, 1950, President Truman, finding that "world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world," proclaimed the existence of the

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ministerial duty to issue passports to all citizen applicants. Cf. Judge Fahy, dissenting, in No. 621, at R. 301. The legislative history (*supra*, pp. 45–53) shows clearly that the President was to exercise two functions: (1) to determine what citizens would be issued passports, and (2) to determine what areas could be visited without a passport (*e. g.*, Canada). See, *e. g.*, 56 Cong. Rec. 6030.

national emergency which is in effect today.[58] This existing state of emergency, together with Section 215 of the Immigration and Nationality Act (8 U. S. C. 1185), was cited as authority for the Presidential Proclamation reinvoking the statutory travel control provisions on January 17, 1953, following the 1952 reenactment of the travel control statute[59] (see *supra*,

[58] Proc. No. 2914, 64 Stat. A454. The pertinent portions of that Proclamation are as follows:

> WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and
>
> WHEREAS world conquest by Communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and
>
> WHEREAS if the goal of Communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and
>
> WHEREAS the increasing menace of the forces of Communist aggression requires that the national defense of the United States be strengthened as speedily as possible:
>
> NOW, THEREFORE, I, HARRY S TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *.
>
> * * * * * *

[59] Proc. No. 3004, 67 Stat. C31, "Control of Persons Leaving or Entering the United States by the President of the United States of America"; see App., *infra*, pp. 105–108. This Proclamation revoked the then-existing Proclamation No. 2523 of

p. 52). The Proclamation stated that "the exigencies of the international situation and of the national defense still require" that the statutory restrictions upon departure and entry be continued in "the interests of the United States * * *" (App., *infra*, p. 106). The regulations of the Secretary relating to departure and entry which had been issued in 1941[60] were expressly incorporated, as amended, in the Proclamation (Paragraph 1, App., *infra*, p. 107).[61]

November 14, 1941, as amended (see *supra*, note 48, p. 51), under which travel controls had been in force up to that time. It is apparent that one of the chief purposes in issuing the new proclamation, substantially continuing the provisions of the one it superseded, was to dispel any possibility that the reenactment of the statutory provisions under which it had been issued might be construed as voiding the prior proclamation. Thus, Proclamation No. 3004 was issued to take effect *nunc pro tunc* as of December 24, 1952, the date on which the Immigration and Nationality Act provision superseded the provision enacted in 1918 and amended in 1941 (see 66 Stat. 281). The terms of Proclamation No. 3004 made it unnecessary to reissue the prior regulations, however (see text, this page).

[60] 22 C. F. R. 53.1–53.9, App., *infra*, pp. 110–112; see *supra*, note 49, p. 51.

[61] The Proclamation further provided that "the provisions of this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, shall be in addition to, and shall not be held to revoke, supersede, modify, amend, or suspend, any other proclamation, rule, regulation, or order heretofore issued relating to the departure of persons from, or their entry into, the United States * * *" (Paragraph 4, App., *infra*, pp. 107–108). Thus if the then-existing provisions of Sections 51.135–51.143 of the Passport Regulations are considered as regulations "relating to the departure of persons from, or their entry into, the United States," rather than merely as regulations relating to the issuance of passports, they are confirmed by the Proclamation.

D. THE REGULATIONS DENYING PASSPORTS ON GROUNDS OF COMMUNIST PARTY MEMBERSHIP OR ACTIVITY ARE WITHIN THE SECRETARY'S STATUTORY AUTHORITY UNDER THE TRAVEL-CONTROL STATUTE

The regulation in question, Section 51.135 (App., *infra*, pp. 112–113), is expressly designed to "promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement * * *." This aim is clearly within the limitations of the statutory delegation: the control of travel on grounds related to the national defense, the national safety, and foreign policy.

When the Secretary of State promulgated the regulation, he acted on the basis of a number of considerations. We print in Appendix B to this brief (*infra*, pp. 117*ff*) the summary of these considerations, and of the State Department's passport practices in relation to Communists, set forth in the *Report of the Commission on Government Security* (1957).

1. The first of these considerations was the history of past Communist abuse of United States passports. As the Commission notes (App., *infra*, p. 113), "ever since the end of World War I, American Communists and alien Communists illegally in possession of American passports had effectively carried on abroad espionage, propaganda and revolutionary activities on behalf of the Soviet Government and the international Communist movement and contrary to the foreign policy of the United States Government".[62] For

[62] As early as 1920, the Department of State adopted regulations providing for the denial of passports to "revolutionary

example, prior to World War II an espionage agent was arrested in Copenhagen and was found to have four United States passports in his possession.[63] In Moscow, Berlin, Canada, and the United States, the Communist underground maintained so-called "Pass-Apparats" devoted to the wholesale forgery and falsification of passports and other documents. Dallin, *Soviet Espionage* (1955), 92–103, 285–287. In the Berlin "Pass-Zentrale" and its European branches, 170 specialists in falsifying passports (known as "cobblers" through the Communist underground) were kept busy. One technique of their trade has been described as follows (*id.* at 100):

> The agents in the provinces and abroad who endeavored to obtain genuine passports from sympathizers (but, for obvious reasons, not members of the Communist parties) or through "front" organizations were sometimes very successful. To serve the party, sympathizers would apply for passports and then turn them over to the apparat. At times the supply of "genuine" passports obtained by this method was considerable. * * *

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radicals". We have printed portions of the 1920, 1921, and 1937 regulations, and of the Foreign Service Regulations in force since 1948, in Appendix C at pp. 125–129. We have also printed portions of a Memorandum from the Under Secretary of State which preceded the initial promulgation of these regulations (App. C, *infra*, pp. 123–125).

[63] *Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, on Scope of Soviet Activity in the United States*, Part 23, 84th Cong., 2d Sess., pp. 1215–1216 ("Senate Hearings" hereafter).

During the Spanish Civil War, several thousand Americans fraudulently obtained passports to join the International Brigade. The bulk of the passports eventually found their way to Moscow for alteration and possible use by Soviet agents (App. B, *infra*, p. 120).[64] This wholesale conversion of passports to Communist purposes naturally constituted a major threat to the currency, prestige, and efficacy of bona fide United States passports, and thus a threat to the travel of their bearers.[65]

The State and Justice Departments' investigations of such activities culminated in the conviction of Earl

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[64] See also Dallin, *op. cit. supra*, at p. 102.

Walter G. Krivitsky, former Chief of Soviet Intelligence in Europe, has described this process as follows:

> All the volunteers' passports were taken up when they arrived in Spain, and very rarely was a passport returned. Even when a man was discharged he was told that his passport had been lost. From this action alone about 200 volunteers came over, and genuine American passports were highly prized at OGPU headquarters in Moscow. Nearly every diplomatic pouch from Spain that arrived at the Lubianka contained a package of passports from members of the International Brigade.
>
> Several times while I was in Moscow in the Spring of 1937, I saw this mail in the offices of the foreign division at OGPU. One day a package of about 100 passports arrived; half of them were American. They had belonged to dead soldiers. That was a great haul, a cause for celebration. The passports of the dead, after some weeks of inquiry into the family histories of their original owners, were easily adapted to their new bearers, the OGPU agents.

Krivitsky, *In Stalin's Secret Service* (1939), p. 95.

[65] See *Dallin*, *op. cit. supra*, at 97 for the effect of Communist forgery of Czech passports on those documents. And compare *For. Rel.* 1916, Supp., 3, 8, concerning the effect of the fraudulent use of American passports by Germans in World War I.

Browder, then general secretary of the Communist Party of the United States of America, and Welwel Warszower, the Party's financial secretary,[66] for unlawful use of passports, their convictions being affirmed by this Court.[67] *Browder* v. *United States*, 312 U. S. 335; *Warszower* v. *United States*, 312 U. S. 342.

In the postwar period, various types of passport frauds have been practiced by persons associated with the Communist movement. The most common of these is perpetrated by individuals wishing to circumvent the restrictions against the use of passports for travel to certain countries behind the Iron Curtain.[68] Instead of challenging the validity of such restrictions in the courts, as have petitioners here, certain persons have falsified their destinations or the purposes of their proposed travel in their applications, and then have used the passports thus obtained to leave the United States for destinations for which

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[66] Senate Hearings, Part 23, p. 1213.

[67] Browder was found to have obtained passports under different assumed names by means of false statements in 1921, 1927, and 1931 (312 U. S. at 336); Warszower, an alien, had obtained his passport by false statements with respect to his name, citizenship, place of birth, and residence abroad, including the use of a certified copy of a forged entry in the Atlantic City birth records (*id.* at 347). The indictment of other violators was barred by the three-year statute of limitations then in force for passport fraud. See Senate Hearings, Part 23, p. 1214.

[68] Use of a passport in violation of its restrictions is a crime (18 U. S. C. 1544), but one who travels to a country for which the passport is not valid does not commit a crime unless he "uses" the passport in the process. See Senate Hearings, Part 23, pp. 1231–1232.

passports would not have been issued had the Department of State been apprised of the true facts.[69]

This, then, was the history of Communist abuse of passports which was one of the factors considered by the State Department in 1950 in adopting a firm policy of denying passports to all Communists[70] (App. B, *infra*, pp. 119–120). That this history lends firm support to that policy is beyond challenge. The record of abuse clearly justified refusal to give passports to Communists when passports were merely "political documents". That record continues to be a valid factor today. For when the passport became an instrument of travel control, it did not lose its characteristics as a "political document" (*Communist Party of the United States* v. *Subversive Activities Control Board*, 223 F. 2d 531, 555, 556 (C. A. D. C.), reversed on

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[69] See *Report of the Commission on Government Security*, pp. 470–475, App. B, *infra*, p. 117*ff*; Senate Hearings, Part 23, pp. 1229–1232; S. Rept. No. 131, 85th Cong., 1st Sess., pp. 214–216 (1957); *Hearing Before the Committee on Un-American Activities of the House of Representatives, Investigation of the Unauthorized Use of United States Passports*, 84th Cong., 2d Sess., passim, especially Part 1, pp. 4321–4343.

[70] Prior to that time some Communists, but not all, were denied passports. President Truman in his message vetoing the Internal Security Act of 1950 (see *infra*, pp. 67–69, 73–75), stated (96 Cong. Rec. 15631):

> It is claimed that this bill would deny passports to Communists. The fact is that the Government can and does deny passports to Communists under existing law.

The Minority Views of the Senate committee reporting that bill also noted that "the Secretary of State has denied passports to Communists and others in the interests of national security", citing 22 U. S. C. 211a. S. Rept. 2369, Part 2, 81st Cong., 2d Sess., pp. 3, 10. See also, to the same effect, 96 Cong. Rec. 13755–13756, 14538, 14599–14600.

other grounds, 351 U. S. 115; *Shachtman* v. *Dulles*, 225 F. 2d 938, 940 (C. A. D. C.)), desirable as such for Communist purposes.[71] Moreover, that the organized use of United States passports for Soviet espionage purposes continues today is attested by a former officer of the intelligence branch of the MVD who defected to the West in Tokyo in January 1954:

> Mr. RASTVOROV. The Military Intelligence Service and Political Intelligence Service, MVD, have special sections, so-called section of illegal intelligence work abroad. In other words, these sections, GRU and MVD, engage in training their own intelligence personnel in order later, after sending many illegally to foreign countries, and particularly in United States and Great Britain, and for these purposes they are very interested in getting documents in foreign countries, in other words, all kinds of official documents, and especially passports, diplomatic, business passports and so on and so on.
>
> They are really interested in this and doing their best to get these passports in order to forge them and send people, they call here sleepers to these countries, and particularly in

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[71] See *Communist Party of the United States* v. *Subversive Activities Control Board*, *supra*:

> * * * Only rudimentary reasoning is necessary to a conclusion that the Government may validly decline to confer its diplomatic protection upon, and to request foreign governments to give aid and protection to, a member of an organization operating primarily to achieve the objectives of a world movement such as the Communist movement is defined to be in the statute. Surely a government owes no duty of protection to those who, dominated by a foreign organization, seek its overthrow. * * *

United States. The United States, at the present time, is the main object for these purposes.

Mr. MORRIS. Getting hold of of the American passports?

Mr. RASTVOROV. Yes.

Mr. MORRIS. It is considered to be a very desirable thing for Soviet intelligence purposes?

Mr. RASTVOROV. Yes, very.

Senator BUTLER. Have you ever seen any evidence of an attempt to counterfeit our passports?

Mr. RASTVOROV. Yes, I know people who work in that section who engage in this.

Senator BUTLER. And they get a good passport and from that as a guide they counterfeit others, is that it?

Mr. RASTVOROV. Yes.

Senator WELKER. Mr. Rastvorov, do you think it is advisable for Communists here in the United States to seek and obtain passports and travel abroad, go overseas?

* * * * *

Mr. RASTVOROV. Yes, it is a very good idea for Communist purposes.

Senator WELKER. How is it with respect to our Government's purposes, the United States?

Mr. RASTVOROV. It is very undesirable for United States Government to permit people, especially Communists or so-called pro-Soviet type, to travel in foreign countries, especially in Soviet Union and in Eastern Europe with these passports, because it is very dangerous, as I mentioned before.

Mr. MORRIS. Do you know what they do with these passports?

Mr. RASTVOROV. Yes, they use it for intelligence purposes.[72]

2. Another factor relied upon by the Secretary of State as supporting the denial of passports to Communist Party members, while the travel control statute is in force, was the history of judicial and legislative findings on the nature and purposes of the world Communist movement, which indicate the purposes for which Communists may well use the right to travel abroad (App. B, *infra*, p. 119). In *Dennis* v. *United States*, 341 U. S. 494, 516–517, the Court found that the defendants' "conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a 'clear and present danger' of an attempt to overthrow the Government by force and violence." See also, *e. g.*, *American Communications Association* v. *Douds*, 339 U. S. 382; *Gerende* v. *Election Board*, 341 U. S. 56; *Garner* v. *Los Angeles Board*, 341 U. S. 716;

[72] Senate Hearings, Part 1, p. 21. At the trial of Col. Rudolf Abel of Soviet intelligence, who was convicted of conspiracy to transmit United States defense and atomic secrets to the Soviet Union and conspiracy to commit espionage (*New York Times*, October 26, 1957, p. 1, col. 4), Lt. Col. Reino Hayhanen, a former subordinate of Col. Abel who defected in May 1957, testified that in 1952 he had entered the United States to do espionage work using a United States passport issued in the name of "Maki" (*New York Times*, October 15, 1957, p. 10, col. 3). The Government submitted in evidence a passport application filed by Hayhanen indicating that he had obtained a United States passport in Helsinki on July 3, 1954, in the name of Eugene Nicolai Maki, a supposed United States citizen (*New York Times*, October 18, 1957, p. 2, cols. 3–4). See also *Washington Post and Times Herald*, February 13, 1958, p. C14, col. 3.

Adler v. *Board of Education*, 342 U. S. 485; *Carlson* v. *Landon*, 342 U. S. 524; *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Galvan* v. *Press*, 347 U. S. 522. In addition, Congress had made a finding in the Internal Security Act of 1950[73] that the "Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship * * *." See *Galvan* v. *Press*, 347 U. S. 522, 529. Of singular importance was a companion finding giving clear expression to a congressional intent that the travel of active Communists be restricted (64 Stat. 987–988; emphasis added):

> As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that—
>
> * * * * *
>
> (8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, *travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.*[74]

[73] Section 2 (1), 64 Stat. 987, 50 U. S. C. 781 (1).

[74] Other findings included the following (64 Stat. 988–989):

> (9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate

In view of this finding and the existing statutory provisions authorizing the Secretary to control travel, the Secretary could not properly have ignored the dangers of issuing passports which would facilitate the travel of Communists and Communist adherents. Cf. *Hintopolos* v. *Shaughnessy*, 353 U. S. 72, 78–79; *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 600.[75]

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their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

* * * * * * *

(15) * * * The Communist organization in the United States * * * present[s] a clear and present danger to the security of the United States and to the existence of free American institutions * * *.

See *Carlson* v. *Landon*, 342 U. S. 524, 535, note 21. The finding as to renunciation of allegiance is particularly significant in view of the fact that allegiance is the touchstone of eligibility to apply for passports (22 U. S. C. 212; App. A, *infra*, p. 109).

[75] Moreover, we question whether the Secretary should be required to issue passports to adherents of the Communist movement when such issuance will enable them to travel to foreign countries and engage in conduct leading to their calling upon this Government for its protection. As Judge Prettyman has noted below (R. 182–183):

A statute [15 Stat. 224 (1868), 8 U. S. C. (1946 ed.) 903b (now 22 U. S. C. A. 1732 (Supp. 1957)] alluded to by the Supreme Court in *Johnson* v. *Eisentrager* [339 U. S. 763, 770], provides that, whenever the President learns that a citizen of the United States has been deprived of his liberty by any foreign government, he must demand the reasons and, if it appears the imprisonment is wrongful, demand release and use such means not amounting to war as are necessary to effectuate the release. So, while a passport as such does not bestow rights of protection which a citizen does not otherwise have, it does, as a permit to travel abroad, allow him to put himself in a position where he may invoke the protective power of this government. So

3. The policy expressed in the regulation of the Secretary not only finds support in prior actions of this Court and of Congress, but it has found subsequent endorsement in both official and unofficial quarters. While considerable criticism has been directed at certain aspects of the implementation and administration of this policy,[76] seldom have thoughtful and informed observers recommended abandonment of the policy itself. Thus, the Commission on Government Security, while recommending a number of administrative and other changes, did so in the context of the following basic finding of necessity (*Report*, 470; App. B, *infra*, p. 117):

> A passport security program is necessary to deter travel abroad by subversives bent on missions detrimental to the United States and to narrow as much as possible the sphere of Soviet international conspiratorial activity in the fields of espionage and propaganda.

One of the most acute critics of the State Department's passport program, Professor Louis L. Jaffe of the Harvard Law School, has stated:

> one of the questions here is whether the Secretary may prevent an American with Communist affiliations from being in a place where political indiscretion might involve the United States Government in international complications.

[76] In this connection, we think it unnecessary to comment upon petitioners' recitation of "horrible examples" (Pet. Br. 43–44). As this Court observed in *Yakus* v. *United States*, 321 U. S. 414, 434, "For the purposes of this case, * * * it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. Action taken by them is reviewable in this Court and if contrary to due process will be corrected here. Hence we have no occasion to pass upon determinations * * *, said to violate due process, which have never been brought here for review * * *."

In the Civil War and again in World War I, the United States set up a rigid system of passport control. The criterion here is the defense of the country from external enemies. It is asserted that the precedents of "war" have no relevance to "peace." But the critical consideration is defense against an external enemy; and communication abroad between our citizens and the enemy cannot by its nature be controlled by the usual criminal process. The facts in a particular case as to the citizen's intention are inevitably speculative: all is to be done after the bird has flown. Now our Congress and the Administration have concluded that the Communist International is a foreign and domestic enemy. We deal with its domestic aspect by criminal process; we would seem justified in dealing with its external aspect by exit control. If an avowed Communist is going abroad, it may be assumed that he will take counsel there with his fellows, will arrange for the steady and dependable flow of cash and information, and do his bit to promote the purposes of the "conspiracy."

* * * * *

* * * despite the heavy risks of maladministration, the United States is, in my opinion, justified in denying passports to persons whose journey abroad is presumptively in furtherance of the Communist "conspiracy." If such a policy is not clearly required, it is, I think, within the range of reasoned choice and not violative of fundamental principle. * * *

Jaffe, *The Right to Travel: The Passport Problem,* 35 Foreign Affairs 17, 26–27 (Oct. 1956). See also Note, 41 Geo. L. J., *op. cit., supra,* pp. 63, 89–90; Note,

"Passport Denied": State Department Practice and Due Process, 3 Stanford L. Rev. 312, 322 (1950–1951).

In the present state of the world, it cannot be said that the dangers of Communist misuse of the "right to travel" are so minimal or so speculative that the Secretary is barred from concluding that such foreign travel by Communists would be contrary to the national security and the national safety in today's era.

4. Petitioners suggest that travel controls are not a justifiable means of combatting the Communist threat because of "the availability of alternative means of communication * * *" (Pet. Br. 45–46). But Congress has found in the Internal Security Act of 1950 that "travel * * * from country to country * * * is a *prerequisite* for the carrying on of activities to further the purposes of the Communist movement" (*supra,* p. 68). The hard fact is that, despite the availability of "alternative means," the Communist movement itself considers travel—and passports—to be of basic importance to its activities (see *supra,* pp. 60–67). It may be that, despite what we have said, limitations upon the travel of Communist adherents are not absolutely indispensable to combat the threat to this country of the international Communist movement. "But because it is not indispensable does not mean that it is not desirable or permissible." *United Public Workers* v. *Mitchell;* 330 U. S. 75, 100. Petitioners, significantly, do not contend that world conditions fail to justify a state of emergency or the invocation of statutory travel controls. Like petitioners, we do not believe that the courts will overrule the collective judgment of the political branches that the

Communist movement has not yet ceased to be the serious internal and external threat which the Court has held it to be. Cf. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 590; *Ludecke* v. *Watkins*, 335 U. S. 160, 167–170.

5. Petitioners also make the curious assertion that the Secretary's refusal to issue passports to Communists, far from effectuating the congressional intent, is directly contrary to that intent as revealed by reading the travel-control statute together with the Internal Security Act of 1950 (Pet. Br. 33–36). The argument is that Congress, by the Internal Security Act, intended to narrow the Secretary's traditional discretion, because Section 6 of that Act[77] makes it unlawful for a member of a registered Communist organization[78] to apply for or use a passport, and for any officer or employee of the United States knowingly to issue a passport to such a member; penalties of up to $10,000 fine and five years' imprisonment for violation are provided. Petitioners argue in effect—without pointing to anything in the statute or its legislative history to support the argument—that this provision occupies the field and nullifies all other statutes or regulations relating to the issuance of passports. But the fact is that Section 6 and the Secretary's regulations serve two different purposes and involve no conflict. Section 51.135 of the regulations (App. A, *infra*, pp. 112–113) establishes cate-

[77] 64 Stat. 993, 50 U. S. C. 785; *infra*, p. 104.

[78] *I. e.*, registered under the procedures of the Internal Security Act of 1950.

gories of persons to whom passports will be denied in the exercise of administrative discretion; Section 6, on the other hand, defines a more limited category of persons who may not even *apply for or use* a passport without being guilty of a felony, and additionally imposes criminal penalties upon officers of the Department of State who knowingly issue passports to such persons. That this penal statute has not yet become operative cannot, on the basis of some clairvoyant insight into "congressional will", preclude the Secretary, in his discretion, from continuing to deny passports to the categories of persons specified in Section 51.135.

Indeed, as already indicated, everything in both the travel-control statute and the Internal Security Act, and their histories, contradicts petitioners' reading of the congressional purpose. Congress knew when the latter statute was enacted that the Secretary was then denying passports to certain Communists in his discretion,[79] yet it gave no indication that it intended that this policy be reversed until such time as a Communist organization became finally registered after proceedings before the Subversive Activities Control Board under the Internal Security Act. Moreover, the travel-control statute was reenacted in 1952, two years after the passage of the Internal Security Act, with a change permitting its invocation during the then-existing emergency (see *supra*, p. 52). This 1952 reenactment gave no indication that the controls it authorized could not be applied to supporters of the very threat against which

[79] See note 70, *supra*, p. 64.

the emergency which was the pre-condition of those controls was directed. Cf. *United States ex rel. Kwong Hai Chew* v. *Colding*, 192 F. 2d 1009, 1011 (C. A. 2), reversed on other grounds, 344 U. S. 590. Petitioners' contention does not make sense.[80]

E. THE SECRETARY MAY REQUIRE INFORMATION AS TO PRESENT OR NEAR-PAST MEMBERSHIP IN THE COMMUNIST PARTY

1. *If present Party membership is sufficient for denial of an application*—Clearly, if the Secretary may refuse a passport to a member of the Communist Party—as we argue above, *supra*, pp. 60–75—he may require a passport-applicant to submit an affidavit with respect to present or near-past membership. The statutes and regulations make such a requirement, and it is an appropriate method of aiding the Secretary to perform his functions.

[80] Petitioners also contend (Pet. Br. 36–37) that the Secretary's regulations conflict with the Expatriation Act of 1868, 15 Stat. 223–224, R. S. 1999 (printed at Pet. Br. 61), because the regulations "necessarily prevent expatriation", which "is not possible without freedom to depart from one's country" (Pet. Br. 37). If petitioners wish to expatriate themselves—and this was not among the stated purposes for which they desired the passports here in issue—they may do so by journeying to any country in the Western Hemisphere, without passports (see 22 CFR 53.2; App. A, *infra*, p. 111), and performing any one of the acts resulting in loss of nationality listed in 8 U. S. C. 1481. In any event, the thrust of this argument goes, not to the Secretary's regulations, but to the statute, 8 U. S. C. 1185 (see Judge Bazelon's dissent at R. 212-213). And the terms of the 1868 Expatriation Act are aimed solely at "any declaration, instruction, opinion, order, or decision of any officers of this government", not at subsequent congressional legislation. If petitioners' reading of the Expatriation Act is correct, it would appear to invalidate all our subsequent laws restricting immigration.

(*a*). Section 1 of Title IX (Passports) of the Act of June 15, 1917; c. 30, 40 Stat. 217, 227, 22 U. S. C. 213, provides as follows (emphasis added):

> Before a passport is issued to any person by or under authority of the United States such person shall subscribe to and submit a written application duly verified by his oath before a person authorized and empowered to administer oaths, *which said application shall contain a true recital of each and every matter of fact which may be required by law or by any rules authorized by law* to be stated as a *prerequisite* to the issuance of any such passport.[81]

The regulations issued by the President[82] prescribe in detail the procedures which must be complied with by all passport applicants, including the manner of execution of the application (22 CFR 51.51–51.73), its contents (22 CFR 51.14), and the necessary supporting documents which must accompany applications (22 CFR 51.23–51.26). The Presidential regulations further provide as follows (22 CFR 51.74):

> *Affidavits.* Any affidavit which may be required under the rules in this part or shall be submitted in support of an application for a passport or the renewal, extension, or amendment of a passport shall be considered as, and become, a part of the application.

As we have seen (*supra*, p. 41), these regulations also include a delegation of rule-making authority to the Secretary of State.

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[81] This provision was reiterated in Executive Order No. 7856 (1938), 3 F. R. 799. See 22 CFR 51.14, App., *infra*, p. 110.

[82] Executive Order No. 7856 (1938), 3 F. R. 799, 22 CFR 51.1, *et seq.*

The regulations of the Secretary, after providing for the denial of passports on grounds of present Communist Party membership or present or potential activity on behalf of the Communist movement,[83] then provide (emphasis added):[84]

> *Oath or affirmation by applicant as to membership in Communist Party.* At any stage of the proceedings in the Passport Division or before the Board, *if it is deemed necessary,* the applicant may be required, *as a part of his application,* to subscribe, under oath or affirmation, to a statement with respect to *present or past membership in the Communist Party.* If the applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.

Reading the foregoing provisions together: (1) the passport statute prohibits the issuance of a passport to any applicant unless and until he has submitted an application containing "a true recital" of "every matter of fact which may be required by * * * any rules authorized by law";[85] and (2) the Secretary's rules require, "if it is deemed necessary," the submission "as a part of his application" of a statement "with respect to present or past membership in the Communist Party", and provide that any affidavit

[83] 22 CFR, 1956 Supp., 51.135; App. *infra*, pp. 112–113.

[84] 22 CFR, 1956 Supp., 51.142; App. *infra*, p. 115.

[85] The Rules of the Board of Passport Appeals require that "prior to petitioning for an appeal, an applicant shall (a) * * * (b) comply with the provisions of § 51.142 [the affidavit requirement, *supra*], as a part of his application, if deemed necessary by the Passport Office". 22 CFR, 1956 Supp., 51.156; App. A, *infra*, p. 116.

required by the rules "shall be considered as, and become, a part of the application". Thus, if the submission of a sworn statement in the form prescribed by Section 51.142, *supra*, is "deemed necessary," the application is not complete and no passport may issue until such a statement has been submitted.[86]

(*b*) Both petitioners have refused to submit the affidavits "deemed necessary" as a part of the application in their cases, and raise a number of objections to the affidavit requirement.[87] But if, as we

[86] Judge Fahy's dissent (R. 241–246) is based upon the conclusion that passports have in fact been denied in these cases, not by a decisional process but "through the self-executing effect of * * * the Regulations" (R. 246). But Section 51.142 is not in fact self-executing, since it requires a decision as to whether the affidavit is in fact "necessary" in a given case.

[87] At their respective Passport Office hearings during which their final refusals to submit affidavits took place, each petitioner grounded his refusal solely upon the claim that Communist Party membership was irrelevant to entitlement to a passport. No constitutional objections to the affidavit were specifically interposed (R. 34–64, 127–150). The only invocation of the Constitution against the affidavit requirement in either case occurred several months before the hearing in Briehl's case, when his attorney declined a written request for an affidavit, relying upon "the First, Fifth, Ninth and Tenth Amendments" (R. 118). Compare *Ullmann* v. *United States*, 350 U. S. 422, 439, note 15, refusing to consider First Amendment objections not raised when the defendant finally refused to answer a question propounded by a grand jury. It is noteworthy that counsel for the present petitioners were also counsel for Ullman, for the Court there said: "Petitioner did not make any objection to the questions other than the assertion of the unconstitutionality of the Immunity Act. It should also be noted that when petitioner—who, the record shows, was an experienced witness, *had been advised by counsel especially experienced in this field*, and was desirous of making this a test

have shown, Communist Party membership is a valid ground for denial of petitioners' applications, any arguments directed against the affidavit requirement are wholly drained of substance. If Communist Party membership is a basis for decision on the applications, it is manifestly an appropriate subject for inquiry, whether it be in the application itself or in the course of administrative proceedings. *In re Anastaplo,* 3 Ill. 2d 471, 121 N. E. 2d 826, certiorari denied, 348 U. S. 946. It must be equally true that the Department of State may lawfully consider as incomplete and refuse to give further consideration to any application which, after an appropriate request directed to the applicant, fails to include such basic information.

As Judge Prettyman said below (R. 194–195):

> * * * There is nothing new or novel about requiring an applicant for a permit or a license to supply pertinent information under oath. Applicants for radio licenses and air route certificates must do so, and applicants for marriage licenses, voting privileges, and business permits must also. And, failing to supply the required data, the applicant cannot exercise his right. We know of no reason why an application for a passport should not be treated by the usual rules pertaining to applications. * * *

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case—refused to answer the questions propounded before the grand jury the second time, he did not claim any privilege under the First Amendment". *Ibid;* emphasis added. We therefore question whether these objections should now be considered by the Court.

It is also noteworthy that in the present cases the Fifth Amendment has never been invoked, except in the letter of Dr. Briehl's attorney, *supra.* It is not relied upon here.

Judge Washington has added (R. 202–203):

> * * * [Petitioners have] not suggested any reason or rule of law that would require a governmental agency to proceed to hear and determine on its merits the claim of a person seeking to exercise a right or privilege, when the claimant declines to file a complete application, as required by statute or by a regulation having—like the present one—the force of law. * * * I do not see why the decision-maker must act in spite of the fact that he has not received answers to relevant questions which were properly asked, and which may provide information necessary for a proper decision.

See also, *e. g., Pacific Power & Light Co.* v. *Federal Power Comm'n*, 111 F. 2d 1014, 1017 (C. A. 9) ("The Commission properly requires applicants to make a full disclosure of all material facts"); *Middlesboro Liquor & Wine Co.* v. *Berkshire*, 133 F. 2d 39 (C. A. D. C.); *Great Western Broadcasting Ass'n* v. *Federal Communications Comm'n*, 94 F. 2d 244 (C. A. D. C.); cf. *Alton Railroad Co.* v. *United States*, 315 U. S. 15, 25; *Brooks* v. *Laws*, 208 F. 2d 18 (C. A. D. C.); *In re Anastapolo, supra; Cloverleaf Trailer Sales Co.* v. *Borough of Pleasant Hills*, 366 Pa. 116, 76 A. 2d 872; *Cohen* v. *Thompson*, 101 N. J. Law 503, 129 Atl. 700; *Spears* v. *State Bar of California*, 211 Cal. 183, 294 Pac. 697; *Rosencranz* v. *Tidrington*, 193 Ind. 472, 141 N. E. 58, 28 A. L. R.

1136; 53 C. J. S., *Licenses*, Sec. 39, pp. 636–637.[88] Petitioners' present plight is of their own making.

(*c*) Petitioners characterize the inquiry by means of the affidavit as an "unconstitutional test oath" which, due to its search into present and past Communist Party membership, further compounds an asserted imposition of bills of attainder and *ex post facto* punishment. But an analysis of the requirement completely disposes of these charges.

Assuming that an admission of *present* Communist Party membership would lead to automatic denials of the applications under Section 51.142 of the regulations,[89] petitioners could have complied with the requirement of an oath or affirmation in any one of three ways, depending upon the actual facts of their membership or non-membership in the Communist Party:—(1) They could have filed affidavits asserting that they were members of the Communist Party. In such event their applications would have been finally denied without further proceedings. (2) They could have filed affidavits asserting that they were not then and had not been in the past members of the

[88] In *United States* v. *Eisler*, 75 F. Supp. 640 (D. D. C.), affirmed, 176 F. 2d 21 (C. A. D. C.), certiorari denied, 337 U. S. 958, a conviction for giving false statements in an application to the Secretary of State for an alien-departure permit was upheld. In sustaining the materiality of the defendant's Communist Party membership to the application for the permit, the District Court said: "The critical question here is whether or not such information was material to a proper consideration of the application and investigation of the applicant * * * " (75 F. Supp. at 644). Holding that it was, the court ruled that the defendant was required to furnish this information in answer to a question on the application form.

[89] 22 CFR, 1956 Supp., 51.142; App. A, *infra*, p. 115.

Communist Party. In that event, this information would have been considered with and balanced against the contrary information indicated in the letters to petitioners and in the affidavits of the Director of the Passport Office (Miss Knight). (3) They could have filed affidavits stating that they were not then members of the Communist Party but that they had been members in the past,[90] outlining the history of such membership. This information would, as in the case of denial of any membership, have been taken into consideration and weighed along with other material available to the Department of State.

Thus, Section 51.142 (the affidavit requirement) calls for a factual statement concerning membership status, not an avowal of beliefs. It does not prescribe a set form which all applicants must sign on pain of denial of the application; instead, it leaves it to the applicant to fill in its substance according to the facts of his individual case. True, one who is a present member of the Communist Party cannot, under the regulation as written, write and sign a truthful affidavit and still hope to be issued a passport, and hence must either (a) leave the Party before signing the affidavit if he is sufficiently desirous of obtaining a passport; (b) sign and submit a statement that he is not a Communist Party member and thus perjure himself; or (c) abandon his attempts to secure a passport. But this was precisely the case in all of the recent instances in which the Court has upheld the principle that, if a substantive criterion such as membership in the Communist

[90] As to how far in the past, see *Stewart* v. *Dulles*, 248 F. 2d 602 (C. A. D. C.).

Party is a valid ground for denial of a right or privilege, then applicants for (and indeed holders of) such rights or privileges can be required to state, even in the form of a prescribed oath, whether or not that criterion is applicable to them. *American Communications Association* v. *Douds*, 339 U. S. 382; *Garner* v. *Los Angeles Board*, 341 U. S. 716; *Gerende* v. *Election Board*, 341 U. S. 56.[91]

The situation is different with respect to past membership in the Communist Party. A past member may write and sign an affidavit fully setting forth the circumstances of such past membership and still hope to be issued a passport.[92] No automatic denial of the application on the basis of past membership alone is provided for in the regulations. The mandate of Section 51.142 thus contains none of the aspects of an *ex post facto* law or a bill of attainder which the Supreme Court found to be present in the cases relied upon by petitioners (*Pierce* v. *Carskadon*, 16 Wall. 234; *Ex Parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277). Since applicants are not faced with the dilemma of either concealing past activity or being denied a passport, Section 51.142 does

[91] This principle was given sharpened definition in *Wieman* v. *Updegraff*, 344 U. S. 183, in which the Court struck down a "loyalty oath" for state employees, not because it was an "oath" provision, but solely because the *content* of the oath referred to activity which was not a valid basis for excluding persons from public employment. 344 U. S. at 190. Cf. *Cummings* v. *Missouri*, 4 Wall. 277, 319–320.

[92] Of course, information as to past Party membership is directly relevant to the issue of whether the applicant is presently a member or presently under the domination or control of the Communist movement.

not, "under the form of creating a qualification or attaching a condition, * * * in effect inflict a punishment for a past act which was not punishable at the time it was committed," or create a "deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals." *Cummings* v. *Missouri*, *supra*, at 319, 325.

That the presence of these absent factors is essential to a bill of attainder or "test oath" is settled by the decisions of this Court. Bills of attainder are "legislative acts * * * that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial * * *." *United States* v. *Lovett*, 328 U. S. 303, 315. "Punishment is a prerequisite" (*Garner* v. *Los Angeles Board*, 341 U. S. 716, 722), and the conduct punished must be past conduct. The words of the Court in rejecting arguments identical to petitioners' in *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 413–415, which relied on the same cases petitioners now cite, are peculiarly apposite here (emphasis in the original):

> * * * [I]n the [*Lovett, Garland*, and *Cummings*] decisions, the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely

to be; but that does not alter the conclusion that § 9 (h) is intended to prevent future action rather than to punish past action.

* * * [M]embers of those groups identified in § 9 (h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past. * * * In the cases relied upon by the unions * * * since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result. * * * We cannot conclude that this section is a bill of attainder.

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* * * [T]he casting of § 9 (h) into the mold of an oath does not invalidate it, if it is otherwise constitutional.[93]

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[93] Petitioners' selective quotation of Alexander Hamilton (Pet. Br. 49), as quoted in *Cummings*, designed to show that any oath requirement is a "test oath" and constitutes an unlawful attempt to "shift the burden of proof from the Government to the citizen", is of no avail. First, petitioners conveniently ignore this Court's statement that Hamilton's remarks were made in the course of "a discussion of the nature and character of these expurgatory oaths, *when used as a means of inflicting punishment for past conduct*"; they also omit Hamilton's own reference to "any oath *with retrospect* [sic] *to past conduct* * * *" (4 Wall. at 330, 331; emphasis added). Second, the initial burden rests not with the Government, as petitioners imply, but with the applicant, who, as we have just seen, has the burden as the moving party of coming forward with information relevant to his application. Thus, in *Pacific Power & Light Co.* v. *Federal Power Comm'n*, 111 F. 2d 1014 (C. A. 9), involving an application for approval of a proposed consolidation, the applicant presumably had a constitutional right to use its property as it saw fit, subject only to regulation in conformity with due process, just as the right to travel is subject to reasonable regulation. The court nevertheless held that the burden of proof rested with the proponent of the

Finally, petitioners raise the objection that execution of the required affidavits would subject them to the "danger of an unwarranted perjury prosecution" (Pet. Br. 57). But as we have noted, petitioners are not required to give a "yes" or "no" answer to a set form; they are free to state all the circumstances of Communist Party membership or non-membership and to explain what they mean by the terms they use, so long as the answers are responsive. Any possibility of resulting perjury would be of their own making.

2. *If present Party membership is not, in itself, sufficient for denial of the application:*—Even if the Secretary cannot deny a passport simply on the basis of present Party membership, without more, he is entitled to know the applicant's connection with the Party. The narrowest issue now before the Court is, as Judge Washington indicated below (R. 201, 204), whether "the Secretary has the power—in some cases at least—to deny passports on grounds to which past or present membership in the Communist Party 'may prove relevant' * * * The question whether past or

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merger, not with the regulatory body to whom the application was submitted. Indeed, the very cases cited by petitioners in their attempt to place the burden on the Secretary—*Goodyear Synthetic Rubber Corp* v. *Department of Industrial Relations*, 122 N. E. 2d (Ohio) 503; *Philadelphia Co.* v. *Securities and Exchange Commission*, 175 F. 2d 808 (C. A. D. C.), vacated as moot, 337 U. S. 901; and *Matter of Peck* v. *Cargill*, 167 N. Y. 391 (mis-cited as "197 N. Y.")—demonstrate that the burden lies with petitioners, since in each case the courts placed the burden of proof upon the proponent of the action, rule, or order. See also Section 7 (c) of the Administrative Procedure Act, 5 U. S. C. 1006 (c).

present membership in the Communist Party is in itself sufficient to support denial of a passport is not before us: there has not here been a denial based on such membership." Judge Washington cited *Garner* v. *Los Angeles Board*, 341 U. S. 716, where this Court was called upon to determine the constitutionality of the dismissal of a number of civil service employees of the City of Los Angeles for refusal to file affidavits requiring each employee to state "whether he is or ever was a member of the Communist Party * * *" (*id.* at 719). The statute barred from such employment any person who was a member of any organization or party teaching or advocating the violent overthrow of the Government (*id.* at 717–718). The Court said (*id.* at 720; emphasis added):

> The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. *Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge.*

Cf. *Korematsu* v. *United States*, 323 U. S. 214, 221–223.

In the same connection, Judge Washington pointed out the present significance of *Konigsberg* v. *State Bar*, 353 U. S. 252 (R. 203). In both that case and this, applicants refused to answer questions relating to Communist Party membership. In *Konigsberg*, the administrative proceedings continued notwithstanding the refusal to answer. The applicant was not informed at the hearing that refusal to answer

was a sufficient independent ground for denial of his application (353 U. S. at 259, note 12), nor did the statutes or rules suggest this (*id.* at 260–261). He was denied admission to the bar, "not * * * simply because he refused to answer questions" (*id.* at 259), but on the basis of an adverse inference drawn from the refusal to answer. The Court held this inference unreasonable in the face of countervailing evidence. Here, on the other hand, the State Department terminated the proceedings upon the refusals to answer. Both the regulations (Sections 51.142 and 51.156, App., *infra*, pp. 115–116) and the administrative officials put petitioners on notice that no action would be taken upon their applications until the information was forthcoming. Each petitioner was "explicitly warn[ed] * * * that he could be barred for this reason alone, * * * and then [was given] a chance to comply" (353 U. S. at 261), but deliberately failed to do so. If this course had been followed in Konigsberg's case, the Court said, "we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press and assembly" (*ibid.*), *i. e.*, the validity of the inquiry *per se*.

In the case of passport applicants, we do not believe that the constitutional questions evoked by an inquiry into Communist Party membership are so far-reaching. See *supra*, pp. 60–73, 75–86; *infra*, pp. 89, *et seq.* But in any event it seems to us that the Secretary cannot be barred from *inquiring*, at the very least, into such Party membership and requiring an answer before he proceeds to a determination of the merits of the application. Communist Party member-

ship is certainly *relevant* to that determination, even if it is not decisive, and the administrators must be able to discover the facts relating to such membership. There is no adequate reason why those relevant facts cannot be obtained from the applicant.

II

THERE IS NO CONSTITUTIONAL OBJECTION TO THE SECRETARY'S REFUSAL TO ISSUE PASSPORTS, FOR FOREIGN TRAVEL, ON GROUNDS RELATED TO PRESENT OR NEAR-PAST COMMUNIST PARTY MEMBERSHIP

In Point I, *supra*, pp. 27–89, we have shown the authority conferred upon the Secretary by the Congress and the President, and that such authority warrants both the regulations at stake in this case and the actions taken by the Department of State with respect to petitioners' passport applications. In the present Point, we support the constitutional validity of these combined actions of the Congress, the President, and the Secretary.

A. THE CONSTITUTION DOES NOT FORBID THE IMPOSITION OF REASONABLE RESTRICTIONS UPON THE TRAVEL OF CITIZENS.

There can be little dispute as to the general power of the Government, acting in its sovereign capacity, to place reasonable restrictions upon the travel of its citizens. Congress has exercised this power almost since the beginning (*supra*, pp. 43–52). The present case involves negative restrictions: the limitation of petitioners' travel to the Western Hemisphere.[94] But the Government may also make affirmative demands of this nature. Thus "the United States

[94] See 22 CFR 53.2, App., *infra*, p. 111.

possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal." *Blackmer* v. *United States*, 284 U. S. 421, 437.[95] Whether this power resides in Congress or the Executive or both is of no moment for present purposes, for while Thomas Jefferson was of the view that the Chief Executive did not have "the prerogative powers * * * of *retaining within the State*, or recalling to it any citizen thereof, * * * *except so far as he may be authorized from time to time by the legislature to exercise any of those powers*",[96] in this case such legislative authorization is found, as we have shown (*supra*, pp. 43–57), in 8 U. S. C. 1185.[97] The Due Process Clause

[95] That case construed and applied the Act of July 3, 1926, c. 762, 44 Stat. 835, now 28 U. S. C. 1783, in affirming the contempt conviction of a citizen served with subpoenas in France, for failure to appear as a witness in the Supreme Court [now the District Court] of the District of Columbia.

[96] Jefferson, Draft of a Fundamental Constitution for the Commonwealth of Virginia, proposed in 1783 (*Writings*, Ford's ed, 1894, Vol. 3, 155–156), quoted by Mr. Justice McReynolds, dissenting, in *Myers* v. *United States*, 272 U. S. 52, 235. (Emphasis added.)

[97] It is appropriate to note, however, that the discretionary power of the Secretary of State to withhold his sanctioning of a citizen's travel by declining to issue a passport has always carried with it a modicum of power to hamper or embarrass, to a greater or lesser degree, the travel of citizens abroad, since the very purpose of a passport has always been to facilitate the applicant's entry into, or mobility or safety within, a foreign country.

Judge Bazelon's discussion of "The President's Inherent Power [to Control Travel]" in the court below (R. 224–238) is not pertinent to the issues in this case. It is premised upon the incorrect assumption that the Secretary "purports to find" in-

is no bar to reasonable and appropriate regulation of travel. Cf. *Korematsu* v. *United States*, 323 U. S. 214; *Hirabayashi* v. *United States*, 320 U. S. 81. In citing these last two cases, the Court has said (*Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591):

> * * * [T]he Due Process Clause does not shield the citizen from conscription and the consequent calamity of being separated from family, friends, home and business while he is transported to foreign lands to stem the tide of Communism. * * * When citizens raised the Constitution as a shield against expulsion from their homes and places of business, the Court refused to find hardship a cause for judicial intervention.

B. THE DELEGATION OF AUTHORITY IN 8 U. S. C. 1185 IS VALID

In their constitutional attack, petitioners contend that, if 8 U. S. C. 1185 is read as a delegation of authority to control the travel of individuals, it is invalid for lack of definite standards (Pet. Br. 31). The claim is also without merit.[98]

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herent power to place *direct* restraints upon travel, such as are authorized by 8 U. S. C. 1185, in his inherent foreign affairs power (R. 225–228). But the Secretary did not make this claim below, as is indicated by Judge Bazelon's earlier statement of the Secretary's contentions (R. 207–208), nor do we make such a claim here.

[98] An initial jurisdictional problem is raised by the fact that petitioners, while attacking the Secretary's regulations as unauthorized by the statutes and unlawful under the First and Fifth Amendments, did not challenge the constitutionality of the statutes themselves in their complaints (R. 2–4, 100–103). Accordingly, the constitutionality of 8 U. S. C. 1185 should not be open to attack by them here. It should be noted that, had petitioners challenged the constitutionality of the statute in

As Judge Fahy noted in his dissenting opinion (R. 242, 243 (emphasis added)):

> * * * This was an assertion by Congress of restraint upon travel *based upon the war power*, coupled with the *executive control over passports incident to the conduct of foreign affairs* * * *. The new statute, however, did not enumerate other specific criteria [than owing allegiance], notwithstanding a passport thenceforth was not merely a political document the denial of which entailed no deprivation of liberty. But I do not think the absence from 8 U. S. C. § 1185 (b) of more specific criteria renders nugatory the control in question. The statute *explicitly limits the control to a time of war or of a presidentially proclaimed national emergency, and to passports.* Control related to the war powers and to the conduct of foreign affairs is thus plainly intended. In order to be validly exercised the powers thus invoked, though subject to the Constitution, are not held to the same degree of legislative or other specificity as are those of government generally. * * * I would interpret the control enacted by Congress as valid when exercised consistently with due process to prevent the reasonable likelihood of harm to our national defense or to the conduct of our foreign affairs. * * *

The contention that the standards of this particular statute "are void to the extent that they contain unconstitutional delegations of legislative power"

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the District Court, a problem as to convening a three-judge district court would have arisen. See 28 U. S. C. 2282; cf. *Bauer* v. *Acheson*, 106 F. Supp. 445 (D. D. C., three-judge district court).

(*United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 542) is not new to this Court. In *Knauff*, in which the Court upheld the exclusion under the alien provisions of the statute of the alien wife of an American soldier, on the basis of confidential information and with no hearing, the Court first held the statute constitutional.[99] While the Court pointed out that the right to exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation" (338 U. S. at 542), and while we make no claim of such inherent executive power to restrict the travel of citizens (see *supra*, note 97, pp. 90–91), it is nonetheless true that the instrument chosen by Congress to effectuate emergency travel controls for citizens—the passport power—*is* such an executive function and is likewise based upon the "power to control the foreign affairs of the nation", at least as much as is the power of exclusion (see *supra*, pp. 29–42).[100]

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[99] See also *Kwong Hai Chew* v. *Colding*, 344 U. S. 590; *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206.

[100] In ruling that "Congress may in broad terms authorize the executive to exercise the power, *e. g.*, as was done here, for the best interests of the country during a time of national emergency" (338 U. S. at 543), the Court placed great reliance upon *Lichter* v. *United States*, 334 U. S. 742, a case upholding a statute (the Renegotiation Act) unrelated to the foreign affairs power. The Court quoted from *Lichter* as follows (338 U. S. at 543):

> It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. * * * Standards prescribed by Congress are to be read in the light of the conditions

In enacting the original 1918 travel-control statute, Congress was, as we have seen, fully aware of the delegation problem (*supra*, p. 47). It expressly declared, however, that "It is essential to meet the situation that the Executive should have wide discretion and wide authority of action. No one can foresee the different means which may be adopted by hostile nations to secure military information or spread propaganda and discontent" (H. Rept. No. 485, 65th Cong., 2d Sess., p. 3).

In judging the validity of the statutory standards—already held valid in relation to aliens—as applied to the travel of citizens, it is noteworthy that in no instance has this Court invalidated, on such grounds, an act of Congress which invoked the war power or related to the inherent Executive powers in foreign affairs.[101] Moreover, where Congress has, as here,

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to which they are to be applied. "They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear."

[101] In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, the Court expressly contrasted the National Recovery Act with previous statutory delegations held valid which related to the war power and which "confided to the President * * * an authority which was cognate to the conduct by him of the foreign relations of the Government" (293 U. S. at 422; see also 423–430).

With respect to the war power generally, see *Hirabayashi* v. *United States*, 320 U. S. 81, 93; *Ludecke* v. *Watkins*, 335 U. S. 160; *Korematsu* v. *United States*, 323 U. S. 214; *Yakus* v. *United States*, 321 U. S. 414; *Home Bldg. & L. Assn.* v. *Blaisdell*, 290 U. S. 398, 426; *United States* v. *Chemical Foundation*, 272 U. S. 1, 12; *McKinley* v. *United States*, 249 U. S. 397; *Selective Draft Law Cases*, 245 U. S. 366; *Stewart* v. *Kahn*, 11 Wall. 493, 506–507; *Miller* v. *United States*, 11 Wall. 268, 303–314.

enacted without challenge, over the past 143 years, legislation similar to that now in force (*supra*, pp. 44–52), the gloss of history lends its weight to the presumption of validity. *Ludecke* v. *Watkins*, 335 U. S. 160, *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304.

As for the war power, the fact that we are not engaged in active hostilities at the present time is immaterial to the continuing validity of the statute, for the war powers "necessarily include authority to take preventive measures against activities that may cause international misunderstandings, which, in turn, may lead to war, as well as against endeavors to subvert, undermine, or overthrow the government". *United States* v. *Peace Information Center*, 97 F. Supp. 255 at 261 (D. D. C.); see also *Henderson* v. *Bryan*, 46 F. Supp. 682, 685 (S. D. Cal.); *Ashwander* v. *T. V. A.*, 297 U. S. 288; cf. *United States* v. *Nugent*, 346 U. S. 1, 9 (peacetime draft statute); *Ludecke* v. *Watkins*, 335 U. S. 160; *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 116; *Hamilton* v. *Kentucky Distilleries & W. Co.*, 251 U. S. 146, 161; *Stewart* v. *Kahn*, 11 Wall. 493.

The nature of the foreign affairs powers of the President and his subordinates, the broad discretion which is his in exercising that power even when his actions may impinge upon the constitutional rights of citizens, and the limited role of Congress as well as of the courts in regard to this power, need not be recalled to the Court. On the problem of legislative delegation in this field, the Court said in *United*

States v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–320, 321–322:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. * * *
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> * * * * *
>
> * * * [W]hat we have * * * said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed * * *
>
> * * * [T]his court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power.[102]

See also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635–636, note 2 (concurring opinion of Mr. Justice Jackson); *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588–589; *Carlson* v. *Landon*, 342 U. S. 524, 542–544; *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 542; *Ludecke* v. *Watkins*, *supra*; *Chicago & Southern Air Lines, Inc.* v. *Waterman*

[102] It is noteworthy that the statute there under consideration did not invoke the war power.

Corp., 333 U. S. 103, 109–110; *Yakus* v. *United States*, 321 U. S. 414, 462–463; *United States* v. *Pink*, 315 U. S. 203; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302; *Foster* v. *Neilson*, 2 Pet. 253.

The limitations on the Executive contained in 8 U. S. C. 1185 are, as Judge Fahy implied (*supra*, p. 92), as explicit as possible in the circumstances confronting Congress. The powers there granted may be invoked only if one of two conditions exist: war or proclaimed national emergency. But these conditions do not alone suffice to bring the powers into play; the President must additionally "find that the interests of the United States require" the invocation of travel controls, and must make a public proclamation of this finding. And by making the passport the instrument for effecting control, Congress has also limited the exercise of the control power to cases relating to the national defense and the related conduct of foreign affairs in time of war or emergency.[103] Since these limitations are expressed in the statute, we need not be concerned with the question of whether a delegation of travel-control power with no limitations, with other limitations, or for other purposes, would be valid. Cf. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100–101.

C. TRAVEL RESTRICTION ON GROUNDS TO WHICH COMMUNIST PARTY MEMBERSHIP IS RELEVANT DOES NOT VIOLATE THE FIRST AMENDMENT.

Petitioners urge that travel control on grounds to which Communist Party membership is pertinent vio-

[103] See note 54, *supra*, p. 53.

lates the First Amendment[104] (Pet. Br. 39–47). Their theory appears to be that First Amendment rights are unlawfully abridged whenever Government action affecting a citizen takes such membership into account, except in the case of criminal prosecutions under the Smith Act or other statutes (Pet. Br. 40).

We have already pointed out (*supra*, pp. 60–75) the reasonableness of denying passports—and therefore travel rights—to persons who are now Communist Party members or under Party control. Their connection with the world Communist movement is such that this country does not have to take the risk that foreign travel which is purportedly innocent in purpose may well turn out to be an instrument of the Soviet Union—for espionage, for communication of information, as a courier, for the other uses to which a firm adherent of another power may be put. In time of war, travel to, or for the purposes of, an enemy country may be prohibited, even if the avowed purpose is innocent; in the present times, it is not unreasonable to restrict the travel of individuals who are in fact adherents of a foreign movement so basically hostile to this country as is the Communist movement.

And it now goes without saying that First Amendment rights are not absolute; they may not be raised as an automatic barrier, regardless of circumstances,

[104] We do not discuss petitioners' contentions relating to activities other than Communist Party membership (Pet. Br. 39–42), since the sole issue in these cases is whether the Secretary may require a statement with respect to such membership.

to the consideration of Communist Party membership in denying a passport in order to guard against the evils of possible future conduct. "* * * [T]he right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court". *American Communications Association* v. *Douds,* 339 U. S. 382, 398. In sustaining a requirement that each officer of a union seeking access to the National Labor Relations Board file an affidavit "that he is not a member of the Communist Party * * * ", the Court held in *Douds:*

> The fact that the statute identifies persons by their political affiliations and beliefs, which are circumstances ordinarily irrelevant to permissible subjects of government action, *does not lead to the conclusion that such circumstances are never relevant.* * * * [339 U. S. at 391; emphasis added.]
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> * * * * * *
>
> * * * Communists, we may assume, carry on legitimate political activities. Beliefs are inviolate.* * * Congress may reasonably find, however, that Communists, unlike members of other political parties, * * * represent a continuing danger of disruptive political strikes when they hold positions of union leadership. * * * [*Id.* at 393.]

Even direct limitations upon political activity, whether or not in behalf of the Communist Party, are permissible when such limitations, reasonable and appropriate in themselves, are found necessary by

Congress to effectuate a lawful governmental objective. *United Public Workers* v. *Mitchell,* 330 U. S. 75.

This Court has not blinded itself to the activities of the Communist Party which go beyond the bounds of constitutional protection. As a result, it has on several occasions, in addition to *Douds,* upheld governmental action based in part if not wholly upon membership in the Communist Party, the First Amendment notwithstanding. It has permitted the denial of bail to long-resident aliens pending determination of deportability on the basis of Communist Party membership and activities, *Carlson* v. *Landon,* 342 U. S. 524; and it has permitted the deportation of resident aliens on grounds of *past* Party membership, without requiring knowledge of the Party's aims. *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 591–592; *Galvan* v. *Press,* 347 U. S. 522; cf. *Rowoldt* v. *Perfetto,* 355 U. S. 115. It has sustained convictions of conspiracy to organize the Communist Party. *Dennis* v. *United States,* 341 U. S. 494. See also the other cases cited, *supra,* pp. 67–68, 83–85. The factors—well-known to the Court—which support these decisions likewise justify a holding that the First Amendment (as well as the Due Process clause) does not require the Secretary of State to ignore Communist Party membership in rendering a passport decision.

D. THE AFFIDAVIT REQUIREMENT DOES NOT IMPOSE AN INVALID "TEST OATH", A BILL OF ATTAINDER, OR AN EX POST FACTO PENALTY

We have already answered (*supra,* pp. 81–86) petitioners' arguments (Pet. Br. 47–52) that the affidavit

requirement is unconstitutional as imposing a "test oath", as well as constituting a bill of attainder and an *ex post facto* penal law.[105]

CONCLUSION

For the foregoing reasons, it is submitted that the judgments below should be affirmed.

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MARCH 1958.

[105] As earlier indicated (*supra*, p. 24), we do not discuss in this case petitioners' contentions concerning those portions of the State Department regulations which have not yet been applied to them. See *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535; *Franklin* v. *Jonco Aircraft Corp.*, 346 U. S. 868; *Gusik* v. *Schilder*, 340 U. S. 128; *Fahey* v. *Mallonee*, 332 U. S. 245; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752; *Yakus* v. *United States*, 321 U. S. 414; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Bourjois* v. *Chapman*, 301 U. S. 183; *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117. Thus, we do not discuss the contentions that possible future denials in petitioners' cases might "impair substantive due process" (Pet. Br. 47), or that the regulations, if applied, would "deny procedural due process" (Pet. Br. 52–57). These matters are discussed in our brief in No. 681, a case of actual denial of a passport after the completion of the established procedures.

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APPENDIX A

STATUTES AND REGULATIONS

1. Section 215 of the Immigration and Nationality Act of 1952, Act of June 27, 1952, c. 477, Title II, c. 2, 66 Stat. 190, 8 U. S. C. 1185, as codified, is as follows in pertinent part:

> § 1185. *Travel control of citizens and aliens during war or natural emergency—(a) Restrictions and prohibitions on aliens.*
>
> When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—
>
> (1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;
>
> (2) * * *
>
> (3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;
>
> * * * * * *

(*b*) *Citizens.* After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

The pertinent provisions of Sections 2 and 6 of Internal Security Act of 1950, Act of September 950, c. 1024, 64 Stat. 987, 993, 50 U. S. C. 781, 785, odified in the United States Code as follows:

§ 781. *Congressional finding of necessity.*

As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that—

* * * * * *

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

* * * * *

(15) * * * The Communist organization in the United States * * * present[s] a clear and present danger to the security of the United States and to the existence of free American institutions * * *.

* * * * * *

§ 785. *Denial of passports to members of Communist organizations.*

(a) When a Communist organization as defined in paragraph (5) of section 782 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

3. The pertinent portions of Presidential Proclamation No. 2914, December 16, 1950, 64 Stat. A454, are as follows:

A PROCLAMATION

WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS, if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I, HARRY S TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *.

* * * * *

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a. m., in the year [SEAL] of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S TRUMAN.

By the President:

DEAN ACHESON

Secretary of State

4. The pertinent portions of Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C31, "Control

Persons Leaving or Entering the United States
y the President of the United States of America",
e as follows:

A PROCLAMATION

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President * * * and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the

interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

* * * * * *

4. Proclamation No. 2523 of November 14, 1941, as amended by Proclamation No. 2850 of August 17, 1949, is hereby revoked, but such revocation shall not affect any order, determination, or decision relating to an individual, or to a class of individuals, issued in pursuance of such proclamations prior to the revocation thereof, and shall not prevent prosecution for any offense committed, or the imposition of any penalties or forfeitures, liability for which was incurred under such proclamations prior to the revocation thereof; and the provisions of this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, shall be in addition to, and shall not be held to revoke, supersede, modify, amend, or suspend, any other proclamation, rule, regulation, or order heretofore issued relating to the departure of persons from, or their entry into,

the United States; and compliance with the provisions of this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, shall not be considered as exempting any individual from the duty of complying with the provisions of any other statute, law, proclamation, rule, regulation, or order heretofore enacted or issued and still in effect.

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this 17th day of January in the year of our Lord nineteen hundred and fifty-three and of the Independence of the United States of America the one hundred and seventy-seventh.

[SEAL] HARRY S TRUMAN

By the President:

DEAN ACHESON

Secretary of State

5. The pertinent sections of Title 22 of the United States Code are as follows:

§ 211a. *Authority to grant, issue, and verify passports.*

The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls, when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States; under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports. [Act of July 3, 1926, c. 772, Section 1, 44 Stat. 887.]

§ 212. *Who entitled to passport.*

No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States. [R. S. Section 4076; Act of June 14, 1902, c. 1088, Section 2, 32 Stat. 386.]

§ 213. *Application for passport; fees for taking.*

Before a passport is issued to any person by or under authority of the United States such person shall subscribe to and submit a written application duly verified by his oath before a person authorized and empowered to administer oaths, which said application shall contain a true recital of each and every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of any such passport. [Act of June 15, 1917, c. 30, Title IX, Section 1, 40 Stat. 227.]

6. The pertinent sections of Executive Order No. 7856, March 31, 1938, 3 F. R. 799, as found in Part 51 of Title 22 of the Code of Federal Regulations, are as follows:

§ 51.14. *Contents of Applications.*

[Identical to 22 U. S. C. 213; *supra.*]

* * * * *

§ 51.74. *Affidavits.*

Any affidavit which may be required under the rules in this part or shall be submitted in support of an application for a passport or the renewal, extension, or amendment of a passport shall be considered as, and become, a part of the application.

§ 51.75. *Refusal to issue passport.*

The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

* * * * *

§ 51.77. *Secretary of State authorized to make passport regulations.*

The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to the rules in this part and not inconsistent therewith.

7. The pertinent portions of the regulations issued by the Secretary of State, as found in Parts 51 and 53 of Title 22 of the Code of Federal Regulations, are as follows:

(*a*) From Departmental Order No. 1003, November 25, 1941, 6 F. R. 6069, as amended by Depart-

nental Regulation No. 11, August 27, 1945, 10 F. R. 11046, in Part 53:

§ 53.1 *Limitations upon travel.* No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into the continental United States, the Canal Zone, and all territories, continental or insular, subject to the jurisdiction of the United States, unless he bears a valid passport which has been issued by or under authority of the Secretary of State and which, in the case of a person entering or attempting to enter any such territory, has been verified by an American diplomatic or consular officer either in the foreign country from which he started his journey, or in the foreign country in which he was last present if such country is not the one from which he started his journey, or unless he comes within one of the exceptions prescribed in §§ 53.2 and 53.3 * * *.

§ 53.2 *Exceptions to regulations in § 53.1.* No valid passport shall be required of a citizen of the United States or a person who owes allegiance to the United States: * * *.

* * * * *

(b) When traveling between the United States and any country or territory in North, Central or South America or in any island adjacent thereto; *Provided*, That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States via any country or territory in North, Central, or South America or in any island adjacent thereto, for which a valid passport is required under §§ 53.1–53.9; * * *.

* * * * *

§ 53.8 *Discretional exercise of authority in passport matters.* Nothing in this part shall be construed to prevent the Secretary of State

from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

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(*b*) From Departmental Order No. 749, March 31, 1938, in Part 51:

§ 51.134 *Applications to be made out completely on most recent forms.* Application for passports should be made on the most recent form or forms prepared by the Department of State and should contain complete information called for in such form or forms.

(*c*) From Departmental Regulation No. 108.162, August 28, 1952, 17 F. R. 8013,[1] as amended by Departmental Regulation No. 108.276, January 10, 1956, 21 F. R. 336, in Part 51 of the 1956 Supplement:

§ 51.135. *Limitations on issuance of passports to persons supporting Communist movement.*

In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the pur-

[1] The preamble to this regulation read as follows:

Pursuant to the authority vested in me by paragraph 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F. R. 681; 22 CFR 51.77), under authority of section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887; 22 U. S. C. 211 (a)), the regulations issued on March 31, 1938 (Departmental Order 749) as amended (22 CFR 51.101 to 51.134) are hereby further amended by the addition of new sections 51.135 to 51.143 as follows: * * *

poses of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist party;

(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;

(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement.

§ 51.136.[2] *Limitations on issuance of passports to certain other persons.*

In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the

[2] Prior to the amendment of January 10, 1956, this section read as follows:

§ 51.136. *Limitations on issuance of passports to persons likely to violate laws of the United States.*

In order to promote the national interest by assuring that the conduct of foreign relations shall be free from unlawful interference, no passport, except one limited for direct and immediate return to the United States, shall be issued to per-

United States, will be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States.

§ 51.137. *Notification to persons whose passport application is tentatively disapproved.*

A person whose passport application is tentatively disapproved under the provisions of § 51.135 or § 51.136 will be notified in writing of the tentative refusal, and of the reasons on which it is based, as specifically as in the judgment of the Department of State security considerations permit. He shall be entitled, upon request, and before such refusal becomes final, to present his case and all relevant information informally to the Passport Division. He shall be entitled to appear in person before a hearing officer of the Passport Division, and to be represented by counsel. He will, upon request, confirm his oral statements in an affidavit for the record. After the applicant has presented his case, the Passport Division will review the record, and after consultation with other interested offices, advise the applicant of the decision. If the decision is adverse, such advice will be in writing and shall state the reasons on which the decision is based as specifically as within the judgment of the Department of State security limitations permit.

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sons as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities while abroad which would violate the laws of the United States, or which if carried on in the United States would violate such laws designed to protect the security of the United States.

Such advice shall also inform the applicant of his right to appeal under § 51.138.

* * * * *

§ 51.141. *Bases for findings of fact by Board [of Passport Appeals].*

(a) In making or reviewing findings of fact, the Board, and all others with responsibility for so doing under §§ 51.135 to 51.143, shall be convinced by a preponderance of the evidence, as would a trial court in a civil case.

(b) Consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line will suffice, prima facie, to support a finding under § 51.135 (b).

§ 51.142. *Oath or affirmation by applicant as to membership in Communist Party.*

At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.

§ 51.143.[3] *Applicability of §§ 51.137–51.142.*

Except for action taken by reason of noncitizenship or geographical limitations of general applicability necessitated by foreign policy

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[3] Prior to the amendment of January 10, 1956, this section read as follows:

§ 51.143. *Applicability of § 51.135 to § 51.142.*

When the standards set out in § 51.135 or § 51.136 are made relevant by the facts of a particular case to the exercise of the discretion of the Secretary under § 51.75, the standards in §§ 51.135 and 51.136 shall be applied and the procedural safeguards of §§ 51.137 to 51.142 shall be

considerations, the provisions of §§ 51.137–51.142 shall apply in any case where the person affected takes issue with the action of the Secretary in granting, refusing, restricting, withdrawing, canceling, revoking, extending, renewing, or in any other fashion or degree affecting the ability of such person to receive or use a passport.

(*d*) From Departmental Regulation No. 108.210, January 4, 1954, 19 F. R. 161, in Part 51 of the 1956 Supplement:

§ 51.156. *Prior administrative remedies.* It is required that prior to petitioning for an appeal [to the Board of Passport Appeals], an applicant shall (a) exhaust the administrative remedies available in the Passport Office, as set out in § 51.137, and (b) comply with the provisions of § 51.142, as a part of his application, if deemed necessary by the Passport Office.

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followed in any case where the person affected takes issue with the action of the Department in granting, refusing, restricting, withdrawing, cancelling, revoking, extending, renewing, or in any other fashion or degree affecting the ability of a person to use a passport through action taken in a particular case.

APPENDIX B

EXCERPTS FROM THE REPORT OF THE COMMISSION ON GOVERNMENT SECURITY (1957), PAGES 470–475

PASSPORT SECURITY PROGRAM

* * * * *

RECOMMENDATIONS

Necessity

A passport security program is necessary to deter travel abroad by subversives bent on missions detrimental to the United States and to narrow as much as possible the sphere of Soviet international conspiratorial activity in the fields of espionage and propaganda.

Abundant evidence exists to support this finding. There is a long history of insidious use of travel documents, not only in the United States but in other nations of the free world, to further the Communist objective of world domination.

The passport is an important instrument in support of the recognized Communist technique of communication by personal contact. It has been employed over the years to insure the presence of American Communists and Americans under Communist discipline at Soviet centers for indoctrination and training, including the Lenin School in Moscow. It has been utilized by Communist sympathizers as a vehicle for their attendance at and participation in activities of international Communist propaganda organizations. It has been a device for the movement of Soviet agents and spies into and out of the United States and other free nations of the world.

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The Internal Security Act of 1950, prohibiting the issuance of passports to members of Communist organizations registered or required to be registered by the Subversive Activities Control Board, enunciated the statutory necessity for travel restrictions in the following language:

"Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement."[1]

In retrospect, the Internal Security Act of 1950 can be viewed as a crystallizing force that terminated fluctuations of State Department passport policies and procedures prevalent for years.

These fluctuations are reviewed in the following excerpts from one of the State Department's own documents:

"Shortly after the Bolshevik Revolution of 1917 this Government became aware of the scope and danger of the worldwide revolutionary movement and the attendant purpose to overthrow all existing governments, including our own. As a countermeasure passports were refused to American Communists who desired to go abroad for indoctrination, instruction, etc. This policy was continued until 1931 when Secretary Stimson reversed the previous rulings. Thereafter until World War II no persons were refused passports because they were Communists.

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"After the termination of hostilities and the return of travel to more normal conditions, the question

[1] 50 U. S. C. sec. 781.

came up as to whether the Department would issue regular passports to individuals if they were Communists. At first passports were refused, but the matter was reconsidered at the highest level of the Department in early 1948 and the decision was made that passports would be issued to Communists and supporters of communism who satisfied the Department that they did not intend, while abroad, to engage in the promotion of Communist activities. At the same time the decision was made that passports should be refused to persons whose purpose in traveling abroad was believed to be to subvert the interest of the United States. Later in the same year the policy was modified to permit the issue of passports to Communist journalists even though they were actively promoting the Communist cause. In September 1950 the Passport Division raised the question, in connection with pending passport applications by Communistic journalists, whether this policy should be modified. It was pointed out that ten members of the National Committee of the Communist Party had been convicted of violating the Smith Act; that the Communists were actively supporting the enemy position in the Korean war, and that the Internal Security Act of 1950 clearly showed the desire of Congress that no Communists should be issued passports of this Government.

"The Department also took into consideration its own experience that ever since the end of World War I, American Communists and alien Communists illegally in possession of American passports had effectively carried on abroad espionage, propaganda and revolutionary activities on behalf of the Soviet Government and the international Communist movement and contrary to the foreign policy of the United States Government. The matter was referred to the Legal Adviser who agreed that it was the duty of

the State Department to refuse passports to all Communists, including journalists."[2]

In the operation of its espionage apparatus in the United States, the Soviet Government has frequently interchanged its agents in Canada, Mexico, and this country, using fraudulent passports in the process.[3]

Here in the United States, false naturalization and birth certificates have been employed in making applications for passports. False names have been used. Identities of other persons, many of them long since dead, have been assumed. Birth certificates of living persons have been bought, and there have been instances where municipal officials have been paid to record births and issue certificates for persons who never existed.[4]

* * * * * * *

Since the Spanish Civil War there has been a great increase in the number of applicants concealing their true destination and purpose of travel.

During the Spanish war, between 2,000 and 3,000 Americans, who obtained passports for travel to some other country, went to Spain and joined the international brigade although their passports were stamped "not valid for travel to Spain." These Americans were required to turn over their passports to the headquarters of the international brigade in Albacete, Spain, "for safekeeping." Most of these passports eventually wound up in Moscow for alteration and possible use by Soviet agents. The United States, as a countermeasure, then replaced every outstanding

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[2] Refusal of passports to Communists, State Department memorandum, May 29, 1956, pp. 1, 2.

[3] The Shameful Years, Thirty Years of Soviet Espionage in the United States, H. Rept. 1229, 84th Cong., 2d sess., p. 4.

[4] Senate Internal Security Subcommittee hearings on "Scope of Soviet activity in the United States," pt. 27, app. I, p. 1497 and 1498.

passport in the world with a new-type document to prevent use of the old ones by Soviet agents.[5]

American supporters of international Communism have frequently certified that their trips abroad for business or pleasure contemplated visits only to certain designated countries. Upon arrival overseas, however, they have breached the restrictions stated in their passports and have passed through the Iron Curtain to become officials, delegates, and observers at conferences of Soviet-dominated propaganda organizations that have spawned infamous denunciations of the United States. Their passports, except for a few isolated instances, do not reflect entry or exit visas evidencing travel behind the Iron Curtain. These have been stamped on a slip of paper which was removed from their possession at the time of their return to the free world.[6] The detached visa device to conceal the fact of visits to the Soviet Union from agencies of the United States Government is known to have existed as far back as 1927.[7]

The Communist-inspired Asian and Pacific peace conference in Peking, China, in October 1952, which was attended by 15 American delegates, is a typical example of concealment.

Henry Willcox and his wife, Anita, of Long Island and Connecticut, despite their records of Communist sympathy, secured passports ostensibly to visit France and Turkey for business. Their passports carried the prevailing restriction against travel behind the Iron

[5] Pt. 23, hearings on scope of Soviet activity in the United States, Internal Security Subcommittee, Committee on the Judiciary, U. S. Senate, May 9–10, 1956, p. 1220–1222.

[6] H. Rept. 53, 85th Cong., 1st sess., annual report of Committee on Un-American Activities for the year 1956, p. 14.

[7] Report of the Subversive Activities Control Board (*Brownell v. Communist Party of the United States of America*), S. Doc. 41, 83d Cong., 1st sess., p. 106.

Curtain, but they showed up in Moscow and boarded a plane that took them to Peking, where Mrs. Willcox read a speech to the conference and Willcox served as vice chairman of the American delegation.

* * * * *

The committee [i. e., House Committee on Un-American Activities] also called several of the American delegates to the World Youth Festival held in Warsaw in 1955. All had concealed their purpose of travel, they were found to have been affiliated with the Communist Party and they refused to answer questions about their passport applications, their travel abroad, and their conduct at the conference.[12]

Of 1,905,152 applications received from September 1, 1952, to August 1, 1956, the Passport Office tentatively denied 275 for security reasons. There were final denials in 29 security cases by the Passport Office from January 4, 1954, to July 31, 1955, and none from August 1, 1955, to August 1, 1956. Final denials by the Secretary of State for 1955 for security reasons totaled 13. However, some indication of the deterrent effect of the program can be deduced from the figures showing that 54 passports were not issued between January 1, 1956, and August 1, 1956, "because of failure or refusal of applicant to execute affidavits" demanded by the Passport Office.[13]

* * * * *

For the reasons specified, we must conclude that a passport security program is a necessity and should be continued subject to changes and modifications delineated with more particularity hereinafter in this report.

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[12] H. Rept. 53, 85th Cong., 1st sess., annual report of Committee on Un-American Activities for the year 1956, pp. 15, 16.

[13] Passport Office response to Commission on Government Security interrogatory, Oct. 3, 1956.

APPENDIX C

Memorandum and Regulations Relating to Denials of Passports to "Revolutionary Radicals" and Others, 1920–1948

1. Portions of a Memorandum of the Under Secretary of State, November 30, 1920:

Code #5000

Department of State,
Office of the Under Secretary,

November 30, 1920.

MEMORANDUM RE APPLICANTS FOR PASSPORTS WHO ARE BOLSHEVISTS OR WHO ARE CONNECTED WITH BOLSHEVIST GOVERNMENT.

Thus far, no definite policy appears to have been adopted by the Department with respect to applicants for passports who openly sympathize with or espouse the cause of the Soviet Government: or persons who are members of organizations or associations that have signified their adherence to the principles and doctrines of Bolshevism; or persons who are engaged either directly or indirectly in propaganda for, or other assistance to, the Soviet Government. As a consequence, each case falling within any of the foregoing categories appears to have been decided without reference to any previous case of a similar nature, and the officer making the decision has, it appears, been guided solely by his own ideas and impressions as gleaned from an examination of the correspondence and reports respecting the individual applicant.

There are now before the Department a number of cases falling within the foregoing

description, decision respecting which should form a basis for action in and facilitate the handling of similar cases in the future.

[There follow summaries of the activities of four passport holders or applicants active in the Bolshevist movement, including one whose "passport was taken up by the Bolshevist authorities and it was subsequently reported that it had been given to a dangerous Bolshevist agitator by the name of Malkin who would endeavor to gain admission to the United States through its use."]

In its dealings with applicants for passports of the above descriptions, this office has endeavored to follow the spirit of the Secretary's note to the Italian Ambassador outlining this Government's attitude toward the Soviet regime. Any assistance in the way of passport facilities, which this Government may render to a person who is working either directly or indirectly in behalf of the Soviet Government is a help to the Soviet Government and tends to delay the day of fulfillment of the hope expressed in the Italian note that the "Russian people" will overcome the existing anarchy, suffering and destitution and "again take a leading place in the world".

It is therefore recommended that passports be refused to persons who fall within any of the following categories.

(1) Any person who counsels or advocates publicly or privately the overthrow or the bringing about of reforms or changes in organized Governments by force:

(Example) Members of the Communist Party; the I. W. W.; the Communist Labor Party; or any other organization of a similar nature.

(2) Any person who actively espouses the cause of the Soviet Government either through public expression or by the distribution or dissemination of Bolshevist propaganda.

(3) Any person who is directly or indirectly working for the Bolshevist Government, (a) correspondents of publications such as the London Daily Herald, Soviet Russia, and other known Bolshevist organs; (b) Employees of the Soviet Government in this and other countries; and (c) carriers of Bolshevist correspondence.

Office Instructions of December 16, 1920:

ABSTRACT OF PASSPORT LAWS AND PRACTICE

(Office Instructions)

Code No. 5000
DECEMBER 16, 1920.

REFUSALS IN THE CASE OF ANARCHISTS, AND REVOLUTIONARY RADICALS

The Department will refuse passports to radicals who fall within any one of the following classes:

> Citizens who are anarchists; citizens who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law; citizens who disbelieve in or are opposed to all organized government; citizens who advocate or teach the assassination of public officials; citizens who advocate or teach the unlawful destruction of property; citizens who are members of or are affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States or of all forms of law, or that entertains or teaches disbelief in or opposition to all organized government, or that advocates the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific

individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, or that advocates or teaches the unlawful destruction of property.

It should be stated that the wording of the definition above is almost precisely that of Section I of the Act of October 16, 1918, which defines aliens radicals to be excluded and expelled from the United States. The only difference is in the substitution of the word "citizen" for "alien".

In every case, action upon reports, showing that a person comes within one of the classes noted, should be based upon specific facts. Each case should be adjusted upon tangible and incontrovertible evidence of revolutionary activity, rather than on suspicion.

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PHILIP ADAMS,
Chief, Division of Passport Control.

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3. Office Instructions of May 4, 1921:

ABSTRACT OF PASSPORT LAWS AND PRECEDENTS

(Passport Division Office Instruction)

Code No. 5005
MAY 4, 1921.

Subject: *Grounds on Which the Issuance of Passports May be Refused.*

The following general regulations will be used as a guide within the Division of Passport Control for determining whether passports may be refused to American citizens who otherwise would be entitled to them. It should be understood however that these instructions are not entirely comprehensive, and that instances will

arise in which passports should be refused although they are not covered by the following rules.

(1) *Disloyal Acts.*

* * * * *

(2) *Suspicion of Intention to Commit Crime or Otherwise to Bring Grave Discredit on This Country.*

* * * * *

(3) *Evaders of Justice.*

* * * * *

(4) *Political Adventurers, et cetera.*

* * * * *

(5) *Persons Suspected of Inducing Immigration.* See paragraph C, Code No. 3435.

(6) *Revolutionary Radicals.* See Code No. 5000.

These instructions are for the information and guidance of the employees of this Division only.

PHILIP ADAMS,
Chief, Division of Passport Control.

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4. Office Instructions of July 30, 1937:

ABSTRACT OF PASSPORT LAWS AND PRECEDENTS

(Passport Division Office Instructions)

Code No. 7.22
JULY 30, 1937

SECTION VII

Subject: *Classes of Persons Ordinarily Refused Passports Under the Discretionary Power of the Secretary of State.*

Under the discretionary power of the Secretary of State, a passport may be refused to any

person. The following categories are illustrative but not inclusive.

1. *Persons guilty of disloyal acts.* * * *

2. *Persons suspected of an intention to commit crime or otherwise to bring grave discredit on this country.* Such for example, as international swindlers and gamblers, persons engaged in the white slave traffic, opium smugglers, confidence men, international spies and other persons whose habitual business practices are such as to bring discredit upon America and things American.

3. *Evaders of Justice.* * * *

4. *Political adventurers, etc.* As those who wish to go abroad to take part in the political or military affairs of foreign countries in ways which would be contrary to the policy or inimical to the welfare of the United States.

5. *Policy of the Department.* The policy of the Department is as far as possible to base the refusal of passports on citizenship grounds only and not on other grounds. This code is not to be considered as listing with finality the classes of cases in which passports are to be refused on nonitizenship grounds. A case may arise not within one of the above classes and in which, if the circumstances so warrant, a passport may be refused. The above mentioned categories must be taken merely as guides, to put examiners on notice, and though a case may seem to fall within one of those categories a passport may ultimately be issued.

6. *Referring cases to the Chief of the Division.* All cases coming within the above categories must be referred to the Chief of the Division for a decision.

R. B. Shipley,
Chief, Passport Division.

5. Foreign Service Regulations of July 9, 1948:

* * * * *

NOTE 32. *Classes of applications for service passports* [1] *to be referred to the Department of State for decision by issuing officers.* Officers of the Foreign Service designated by the Secretary of State to issue service passports shall refer the following classes of such applications to the Department of State for decision and shall not, except as hereinafter specifically provided, issue service passports to the applicants concerned until they have received advance authorization for such action from the Department:

* * * * *

(*c*) Applications submitted by persons of doubtful loyalty, criminals, political adventurers, and revolutionaries. If the officer has any reason to doubt the loyalty of an applicant for a service passport or if it is suspected that an applicant intends to commit crime or otherwise bring grave discredit on the United States as an evader of justice, a political adventurer desiring or intending to take part in the political or military affairs of a foreign government in ways which would be contrary to the policy or inimical to the welfare of the United States, a revolutionary radical, or a person engaged in subversive activities for a foreign government, the officer shall decline to issue a service passport to such applicant and shall forward the application to the Department with a statement of the facts in the case. In an emergency, and only after an investigation which proves his doubt or suspicion is unjustified, the officer may telegraph to the Department at its expense for authorization to issue a service passport.

* * * * *

[1 "Service passports" are passports issued by Foreign Service Officers abroad, to whom these regulations are directed.]

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IN THE

Supreme Court of the United States

October Term, 1957

No. 481

ROCKWELL KENT and WALTER BRIEHL,
Petitioners,

v.

JOHN FOSTER DULLES, Secretary of State,
Respondent.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

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BRIEF FOR AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

Interest of *Amicus*

The American Civil Liberties Union, appearing herein with the consent of all the parties filed with the Clerk of this Court, is a non-profit, non-partisan organization dedicated to the advancement of the constitutional rights of American citizens.

Amicus believes that these cases involve an abridgment of one of the most fundamental of those rights, the right of free movement.

Amicus also believes these cases disclose an abuse of the power vested in the federal government which represents a threat to all of those rights.

These cases are concerned with the denial of a passport to American citizens because of their alleged sympathy with the Communist Party and their refusal to take an oath with respect to present or past membership in it. *Amicus*

has no sympathy with the aims and objectives of the Communist Party or movement but believes that the Passport Regulations have the improper effect of making mere membership therein or association therewith, past or present, a basis for restriction on the right of free movement.

Statement of the Case

The facts relied upon by *amicus* are set forth in the Petitioners' brief and the Record before this Court. In the case of Rockwell Kent they involve the denial of a passport because of the opinion of the Department of State that he had "a consistent and prolonged adherence to the Communist Party line" and the failure of the Department to process his appeal because of his refusal to take an oath concerning his past or present membership in the Communist Party. In the case of Walter Briehl, the same action was taken. The stated reasons for the tentative denial are summarized in this brief.

This brief is submitted in support of the Petitioners herein on two issues: first, whether the right of free movement is a right protected by the Constitution and, second, whether the action taken by Secretary of State in failing to issue the passports is an abuse of the power vested in the federal government.

Amicus supports the further points made in the able brief submitted by the Petitioners. No purpose would be served by repeating them here. *Amicus* believes that the points herein presented are of grave importance to civil liberties and of controlling significance in the instant cases. *Amicus* urges the Court to reverse the judgments below.

POINT I

There is a right of free movement which is as fundamental, as firmly embedded in American history and as fully protected by the Constitution as any of the rights specifically enumerated therein.

Amicus emphasizes the nature and importance of the particular right which is primarily involved in these cases, "the right of free movement."

In cases involving the right of free speech, particularly in *Dennis* v. *United States*, 341 U. S. 494 (1951), this Court has pointed out that judicial solution of the vexing problem presented by such cases is necessarily arrived at by the process of balancing conflicting interests. This process cannot be reduced to a formula but, to the extent that it can be placed in words, *amicus* believes that it is to be found in the words of Judge Learned Hand which were repeated and adopted by Chief Justice Vinson in the majority opinion of this Court in the *Dennis* case:

> "* * * the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

The conflicting interests in the *Dennis* case were different from those in the cases now before this Court. In *Dennis*, the "evil" under consideration was the violent overthrow by the Communist Party of the federal government; here, the "evil" would seem to be interference by the Communist Party with the conduct of foreign affairs. In *Dennis*, the means used to overcome the evil was punishment, by fine, imprisonment or both, of any person convicted of an actual act of advocacy of violent revolution; here, the means used to overcome the evil appears to be refusal of a passport to any American citizen suspected by the Secretary of State of being likely to engage in activities abroad in furtherance of the Communist movement. Finally, in the *Dennis* case, the right involved was that of free speech. Here, it is "the right of free movement."

The process, however, of balancing conflicting interests, which was used in the *Dennis* case is applicable to the present cases. Indeed, the process would seem to have been used by the majority of the court below in arriving at their decisions, Judge Prettyman, in the majority opinion, said:

> "Our conclusion is reached by such a balancing. In the international situation of the present, the reasonable requirements of national security and interest and the delicate characteristics of foreign relations outweigh the needs or desires of an individual to travel, when the Secretary finds the facts to be such as to preclude grant of a passport under this regulation."

Nevertheless, proper use of the process of balancing conflicting interests requires that each particular interest shall be given its true weight and importance; and it is in this respect that *amicus* believes that the court below erred. Although at the outset of the opinion Judge Prettyman expands at length on the evil presented by the Communist movement, in his subsequent discussion of the right which he calls "the right to travel" he raises the question as to whether that right is protected by the Constitution, and then jumps to the conclusion that it is a "limited right" only.

Under the circumstances, it is hardly surprising that the majority of the court below decided that the public interest in overcoming the evil presented by the Communist movement far outweighed the Petitioners' "limited right to travel."

Amicus believes the problem should be considered in terms of a "right of free movement" rather than in terms of a "right to travel" because the former is a more comprehensive term. It avoids any possible construction that the right exists only for pleasure or in relation to foreign countries.

This right of free movement has always been recognized as an essential aspect of the American genius. More than

anything else it has distinguished us from the other peoples of the world. While in the past this right may have been chiefly related to movement within the United States, it surely needs no elaborate demonstration to show that with our position as an international power, it must cover movement throughout the world.

The right *affected* by Sections 51.135-51.143 of the Passport Regulations (Title 22 Code of Federal Regulations) is the right of free movement for any purpose and any destination. When the true nature of the right is recognized, its importance becomes self-evident.

The right of free movement is essential to the exercise of many important constitutional rights of American citizens. Take it away, and you confine the right of free speech, you eliminate the right of peaceable assembly, you nullify the guaranty against deprivation of life, liberty and property without due process of law.

Take it away, and you wipe out a proud distinction between the American citizen of the present and his less fortunate fellow human beings of both the present and the past; for the right of free movement is inseparably connected with American history and tradition.

It has been pointed out that our history is dominated by a continuous process of movement—by immigration, the movement of peoples from the Old World to the New, and by the frontier, the movement of American citizens and immigrants to the "West".*

It has even been claimed that in the frontier, or the Westward movement, lies the key to our culture, the explanation of our very special brand of rugged, individualistic democracy.** This theory has been disputed and

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* Arthur Meier Schlesinger, New Viewpoints in American History (1928), p. 2.

** Frederick Jackson Turner, The Frontier in American History (1921).

qualified, but the fact of movement, which the chief exponent of the theory recognized to be the outstanding feature of the frontier, cannot be gainsaid:

> "All was motion and change. A restlessness was universal. Men moved in their single life from Vermont to New York, from New York to Ohio, from Ohio to Wisconsin, from Wisconsin to California, and longed for the Hawaiian Islands. When the bark started from their fence rails, they felt the call to change. They were conscious of the mobility of their society and gloried in it." *

At the beginning of this century, it became popular to speak of the frontier as "vanishing" and it was commonly thought that the great movement that had characterized it had come to an end. The last decade, however, witnessed what has been described as "the largest westward movement in American history." ** The Pacific Coast states boasted population increases of 50%, with California emerging as the second most populous state in the Union. The Southern and Southwestern states also had a rapid population growth—particularly Florida, Arizona, Texas and Virginia.

Today, the movement has reversed itself. The flow is from the New World back to the Old, and one of our most popular magazines, in a very recent issue devoted exclusively to that subject, has referred to the world at large as "our new and vaster frontier", because of the millions of Americans who now live and travel abroad for business as well as pleasure. ***

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* Frederick Jackson Turner, The Frontier of American History (1921); pp. 354-355.

** Samuel Eliot Morison and Henry Steele Commager, The Growth of the American Republic (4th Ed., 1956); Vol. II, p. 783.

*** Life Magazine, Vol. 43 No. 26 (December 23, 1957) pp. 18-19.

This unending process of movement, however, would be of little or no significance if it had not left its mark indelibly stamped on our national character. It has been noted by virtually every social historian who has examined us as a people that, not only is movement our natural state, but the desire for movement—the "itch" to be "on the go" is our birthright:

> "The feeling an American dreads most is that of being 'stuck'—held fast in the mud of an environment where everything seems stagnant. In many areas of Europe and the Far East this has been men's destiny for centuries, but to an American it seems a violation of everything he has felt about life. The sensation of being trapped is the ultimate indignity. So he moves. And his moving keeps alive his sense of social possibility, the belief that something can happen; and as long as something can happen all is not lost." *

Amicus ventures to say that if the average American citizen were offered a choice between the right of free speech and the right of free movement, the right to express his views or to hear the views of others, in private or public, on politics, religion or any other subject, as contrasted to the right to take to the open road on foot or in his automobile, for business, pleasure or any other purpose, it is questionable which he would choose. The statement is not intended to be derogatory or even condescending. The question posed is a difficult one to answer. Which, really, is the more important right? Would either one survive for long without the other?

Unfortunately, rights are usually not recognized until such time and then only to such extent as they are called into question. Until today, therefore, the right of free movement has perhaps not received the full recognition

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* Max Lerner, America as a Civilization (1957), p. 100.

that it deserves. To say that a right has not received full recognition, however, is not to say that it is a "limited right".

As a matter of record, whenever the right of free movement has been challenged, it has not only been recognized and championed, it has been upheld in no uncertain terms.

When the British Sovereign, who was more interested in the exploitation of the wilderness by companies in which he had a direct financial interest, closed off that area to his American subjects, they objected to the limitation on the right of free movement, and listed it as one of their grievances in the Declaration of Independence:

> "He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriation of Lands."

After the War of Independence, when the newly established States began to assert the rights of the former Sovereign, the newly-declared American citizens express their concern for the right of free movement in Article IV of the Articles of Confederation:

> "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States, in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively * * *."

In the Constitution, the same article appears in reduced form as Article IV, Section 2.

For the next hundred and fifty years, only three cases came before this Court which substantially involved the right of free movement.

The first such case, *Crandall* v. *Nevada*, 73 U. S. (6 Wall. 35), arose when the State of Nevada imposed a tax on every person leaving that state. This Court held the statute to be unconstitutional.

The second case arose when Georgia levied a tax on many occupations, including that of "immigrant agent." Although the majority of this Court did not find the statute invalid, they were sufficiently impressed by the argument that it endangered the right of free movement for Chief Justice Fuller to make the following comment (*Williams* v. *Fears*, 179 U. S. 270 [1900]):

> "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty * * *."

The third and last case, until the present ones, *Edwards* v. *California*, 314 U. S. 160 (1941), arose when California passed legislation to stop the "Okies." The majority of this Court found the legislation to be in conflict with the commerce clause of the Constitution. In his concurring opinion, however, Mr. Justice Douglas used the term "the right of free movement," and he described it as "a right of national citizenship" (314 U. S. 160, 181).

Today, in the cases now before this Court, the right of free movement meets its severest challenge. It must, therefore, be given its full measure of recognition. If, as *amicus* has argued, it is a right which is self-evident and inalienable, in the sense that it is an inseparable feature of our national character, if its existence is justified by logic, confirmed by history, and recognized

in the opinions of this Court in the few cases involving the right which have come before the Court, then *amicus* respectfully submits that it should be held by this Court to be as fully protected by the Constitution as any of the rights specifically enumerated therein.

In making this point, *amicus* relies not only on the argument that, because it is essential to the exercise of every important constitutional right of American citizens, the right of free movement is protected by the First and the Fifth Amendments; *amicus* relies also on the proposition that a right as fundamental and as firmly embedded in American history as the right of free movement is protected by the Ninth Amendment, even though it is not specifically enumerated in the Constitution or the Bill of Rights:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

This "Forgotten Amendment" has recently been analyzed, in the context of the historical period in which it was written, in a manner and to an extent that should forever lay to rest any doubts about its meaning.* It appears to have been added by James Madison to the Bill of Rights to overcome the argument, made by Alexander Hamilton in "The Federalist", that the enumeration of some rights in the Constitution might lead to a construction of that document which would deny the existence and importance of any right not specifically enumerated.

The right of free movement is just such a right.

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* Bennet B. Patterson; The Forgotten Ninth Amendment (1950).

POINT II

The action taken by the Secretary of State in and under Sections 51.135-51.143 represents an abuse of the power vested in the federal government in that it constitutes an invasion of the constitutional rights of American citizens which is justified neither by the gravity of the evil apparently intended to be overcome nor by the means employed to overcome it.

As already indicated, at the outset of the majority opinion of the court below, there is an extended discussion of the evil presented by the Communist movement. That the validity of every action taken by the federal government which relates to the Communist movement cannot be disposed of solely by reference to that movement in general terms is recognized by Judge Prettyman, who, in the court below, further defines the evil and specifies two dangers to which it may give rise in the field of foreign relations. First of all, he states, travel abroad by American citizens who are members or adherents of the Communist movement facilitates communication between them and their foreign comrades. Secondly, travel abroad by such citizens may create "international incidents which might arouse hostile activities" on the part of Communist countries.

If such is the nature of the evil, *amicus* protests that it is hardly grave enough to warrant the extreme action taken by the Secretary of State to overcome it. The first alleged danger is no danger at all, unless the facilitation of free speech is dangerous. Undoubtedly the ultimate results of facilitated communication between American citizens and their foreign comrades in the Communist movement might be harmful in some respects to the best interests of our country; but not the facilitated communication itself. Besides, such facilitated communication seems a matter of less concern to our national interests in the field of foreign rela-

tions, to be acted upon by the Secretary of State, than in the field of internal security.

As for the second alleged danger, *amicus* submits, in all due respect, that it is, to say the least, fanciful. The enemies of this country hardly need American citizens who are members or adherents of the Communist movement to create international incidents as an excuse for hostile activities. They have an overabundance of international incidents, they can manufacture such incidents when none exist, they do not really need any such incidents as an excuse for hostile activities.

In the concluding part of this brief, *amicus* will show that the responsibility for failing to provide an adequate definition of the evil under consideration in these cases rests not with the court below but with the Secretary of State, for promulgating Sections 51.135-51.143 of the Passport Regulations without any specific directive from Congress or the President. Here, however, *amicus* is concerned with the means which the Secretary of State employed to overcome whatever evil he believed to b confronting the nation in the field of foreign relations; and for that purpose *amicus* resorts once more to the *Dennis* case, and this time to the particular facts of that case.

In the *Dennis* case, this Court considered the constitutionality of an act of Congress, the Smith Act, which made it a crime knowingly and wilfully to advocate the overthrow of the federal government by force and violence. This Court scrutinized the statute very closely before it came to the conclusion that it was valid, and that the federal government had the power to punish a specific act actually committed with the clear intent to overthrow it by force and violence, because the proscribed act involved the exercise of the right of free speech.

More recently, in *Yates* v. *United States*, 354 U. S. 298 (1957), this Court considered the Smith Act once again.

This time, the Court was asked to determine whether a conviction under the statute was valid where the trial court refused to charge the jury that, in order to find the defendants guilty, they had to find that the defendants advocated forcible overthrow of the federal government as an incitement to action, not merely as an abstract doctrine.

In the opinion, Mr. Justice Harlan emphasized the distinction made in prior cases between the two types of advocacy, but avoided any constitutional question based on such distinction by construing the Smith Act as punishing advocacy only when intended as an incitement to action.

From the decisions of this Court in the *Dennis* and the *Yates* cases, *amicus* believes that every action taken by the federal government or any state government which affects a constitutional right of American citizens will be scrutinized to determine whether the action relates strictly to a proper purpose and affects the constitutional right only to the extent necessary to attain that purpose.

In the present cases, the Court is considering the constitutionality of regulations promulgated by the Secretary of State which enable him to prevent American citizens who fall within certain classifications from travelling abroad.

The American citizens in question are: (1) members of the Communist Party; (2) former members who continue to act "in furtherance of the interests and under the discipline of" that Party; (3) persons who engage in activities "as a result of direction, domination or control exercised over them by the Communist movement"; and (4) persons as to whom there is reason to believe that they are going abroad to engage in activities "for the purpose, knowingly and wilfully of advancing that movement."

As pointed out in the dissenting opinion of Judge Bazelon in the court below and in the brief of the petitioners' attorney, there is grave doubt that the regulations of the Secretary of State under consideration are sanctioned by

any act of Congress or the President, or by a power delegated to or inherent in either the legislative or executive branch of the federal government. For the purposes of the point which *amicus* now urges upon this Court, however, we will assume that the regulations under consideration can be given the same weight as if incorporated in an act of Congress, like the Smith Act, for example. Even if they are given such weight, *amicus* submits that the regulations must be struck down as an extreme abuse of the power vested in the federal government.

In the Smith Act, Congress undertook to invade the province of free speech to the extent necessary to curb actual advocacy of violent revolution, by punishment of an act of advocacy after it had been committed. Under Sections 51.135-51.143 of the Passport Regulations, the Secretary of States invades the province of free movement and eliminates an entire area of such movement, that of travel abroad, to curb possible interference with the conduct of foreign relations, by prior restraint, based on membership in or association with the Communist Party or the international Communist movement.

The sole standard by which an American citizen is granted or denied a passport under Sections 51.135-51.143 is membership in or association with Communist organizations. The citizen may have engaged in entirely legal and even beneficial activities. He may be denied a passport, however, if he engaged in those activities as a member of, or in some other association with, a Communist organization.

The case of Dr. Briehl is an example. This Petitioner was refused a passport in 1955 for the stated reasons that he was (1) alleged to have been a member of the Communist Party in 1936; (2) a member of two other allegedly Communist organizations at an unspecified date; (3) a "contact" of two more allegedly Communist organizations, also at an unspecified date; (4) the author of an inoffensive

article which appeared in a "Communist publication," also at an unspecified date; (5) a sponsor of an entirely legal campaign to present a petition to the President, conducted, however, by an allegedly Communist organization; and (6) a contributor to an entirely legal bail fund, also conducted by an allegedly Communist organization on behalf of leaders of the Communist Party.

The special vice of Section 51.135 is that of any statute or ordinance requiring an American citizen to obtain a "permit" as a prerequisite to the exercise of a constitutional right. *Saia* v. *New York*, 334 U. S. 558 (1948); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Burstyn* v. *Wilson*, 343 U. S. 495 (1952); *Staub* v. *Baxley*, 355 U. S. —, 26 L. Wk. 4079 (decided January 13, 1958).

In the cases now before this Court the "permit" is the passport, and the right is the right of free movement. All of the vicious characteristics remain—the prior, absolute restraint, the vague and indefinite standards for issuing the permit, and the application of those standards by an administrative official vested with an almost unlimited discretion.

Of the cases cited above, the *Burstyn* case is particularly in point. In that case this Court reviewed a New York statute which required any person wishing to exhibit a motion picture in public to obtain a permit from a censor who was authorized to deny the permit if the motion picture was, among other things, "sacrilegious."

Mr. Justice Clark, speaking for a unanimous court, pointed out that the statute raised a very serious question under the constitutional guarantee of separate church and state with freedom of worship for all in that the application of the "sacrilegious" test would involve the state government in the defense of particular religious doctrines. He avoided that particular constitutional question, and condemned the statute as an invalid prior restraint on freedom of speech.

The main difference between the statute in the *Burstyn* case and Section 51.135 would seem to be that, in place of the word "sacrilegious", there is the word "Communist", *i.e.*, "Communist" in the broader sense of member or adherent of the Communist movement, as contrasted to card-carrying members of the Communist Party, U. S. A. In the *Burstyn* case, however, the "sacrilegious" test was at least sanctioned by an act of the State legislature. The "Communist" test is not sanctioned by any act of any branch of the federal government.

Conclusion

Amicus reverts, briefly, to a point which it has intentionally passed by. It has referred repeatedly to the process of balancing conflicting interests, but, in doing so, it is forced to admit that it has little or no guidance in evaluating certain of the conflicting interests except its own predilections.

In his concurring opinion in the *Dennis* case, Mr. Justice Frankfurter pointed up the dilemma (341 U. S. 525):

> "But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

"Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress."

Amicus points out that the fact remains that on the subject matter of Sections 51.135-51.143, Congress has not spoken. To the extent, therefore, that *he* has spoken—and acted in the premises—the Secretary of State has done so hastily, and he should, in view of the effect of his action on an important constitutional right of American citizens, be held to have acted improperly.

Respectfully submitted,

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